SUPREME COURT, U. S.

FILED

IN THE

Supreme Court of the United States

October Term, 1950

No. 102 0

BENJAMIN TEITELBAUM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented for Review	2
Constitution Provisions and Statutes Involved	3
Statement of the Case	5
The Charges Relating to Petitioner	5
(a) Count One—Conspiracy	5
(b) Counts Two to Twelve (Violation of 18 U.S.C. 1952)	6
(c) Counts Sixteen and Seventeen (Violation of 18 U.S.C. 2314)	17
(d) Count Twenty-Three (26 U.S.C. 7260-(1))	7
Summary of Facts	7
The Beverly Hills Hotel Incident	12
The Witness Pauline Carson	12
The Unindicted Co-Conspirators, Gebhard and Snyder	13
The Telephone Records	15
Argument	16
A. The Questions Presented for Review Justify the Granting of Certiorari	16
B. Discussion of the Points Raised	18
1. State of California Penal Code Section 332 Is Not a Gambling Offense in Violation of State Law and the Charges and	

Page

Proof Relating to Counts One Through Twelve of the Indictment Do Not Constitute a Violation of 18 U.S.C. Section 1952 18

2. An Essential Element of Conspiracy to Violate Sections 1952 and 2314 as Prohibited by Section 371, Title 18, United States Code Is the Agreement to Use Interstate Facilities in Travel or Interstate Commerce 20

3. Guilt of the Substantive Offenses of Violation of 18 U.S.C. Sections 1952 and 2314 Cannot Be Upheld, When Petitioner Was Indicted as an Aider and Abettor, and Conviction Rests Solely on Guilt as a Conspirator, Without Agreement Involving the Use of Interstate Facilities 24

4. Petitioner Has Effectively Been Deprived of Due Process by a Combination of Prejudice and Plain Error 25

(a) The Cross-Examination of the Witnesses Lewin and Carson 25

(b) The Proceedings Had in the Presence of the Jury Relating to the Unindicted Co-Conspirators, Gebhard and Snyder, Added Critical Weight to the Prosecutor's Case .. 32

(c) The Allowance of Multitudinous Records of Telephone Calls Into Evidence Without Proper Foundation Has Permitted Conviction of Crime Based Upon Conjecture 39

Page

(d) To Instruct the Jury, Considering the State of the Record, That the Conspiracy Was Presumed to Continue Until the Contrary Was Demonstrated by the Defendant, Imposed an Unjustifiable Burden of Proof Upon Petitioner 42

Conclusion 43

INDEX TO APPENDICIES

Appendix A. Opinion of the Court of Appeal 1

Appendix B. Order 37

Appendix C. Pertinent Amendment and Statutes Involved 38

TABLE OF AUTHORITIES CITED

Cases	Page
Baker v. United States, 393 F. 2d 604, cert. denied, 393 U.S. 836, 89 S. Ct. 110, 21 L. Ed. 2d 106	21
Baker v. United States, 429 F. 2d 1278	21
Courtney v. United States, 390 F. 2d 521	32
Devore v. United States, 368 F. 2d 396	26
Findley v. United States, 362 F. 2d 921	21
Fletcher v. United States, 332 F. 2d 724	38
Grimes v. United States, 379 F. 2d 791	23, 24, 40
Homan v. United States, 279 F. 2d 767	32
Hudson v. United States, 387 F. 2d 331	32
Ingram v. United States, 360 U.S. 672	16, 22
Leary v. United States, 383 F. 2d 851	32
Namet v. United States, 373 U.S. 179, 10 L. Ed. 278, 83 S. Ct. 1151	37, 38
Nassif v. United States, 370 F. 2d 147	23, 24
Osborne v. United States, 371 F. 2d 913	40, 42
Pereira v. United States, 347 U.S. 1	16, 22, 23
Pinkerton v. United States, 328 U.S. 640	24
Ramirez v. United States, 294 F. 2d 277	32
Roberson v. United States, 249 F. 2d 737	32
Thurman v. United States, 316 F. 2d 205	32
Turf Center, Inc. v. United States, 325 F. 2d 793	18
Twitchell v. United States, 313 F. 2d 425	23
United States v. Barnes, 383 F. 2d 287	16, 23
United States v. Bergland, 218 F. 2d 159	19
United States v. Birns, 395 F. 2d 943	26
United States v. Blassingame, 427 F. 2d 329	21

Page

United States v. Byrd, 352 F. 2d 570 26

United States v. Corallo, 413 F. 2d 1306 23

United States v. Edwards, 366 F. 2d 853 .....16, 23

United States v. Fellabaum, 408 F. 2d 220 .....16, 23

United States v. Goldberg, 401 F. 2d 644 43

United States v. Hoffa, 349 F. 2d 20, aff'd 385 U.S. 293, reh. den., 386 U.S. 940 40

United States v. Houlihan, 332 F. 2d 8, cert. denied, 379 U.S. 828, 85 S. Ct. 56, 13 L. Ed. 2d 37 21

United States v. Howey, 427 F. 2d 1017 21

United States v. Maloney, 262 F. 2d 535 .....17, 38

Dictionary

Black's Law Dictionary (4th Ed.) 43

Miscellaneous

Hearings, Senate Committee on Judiciary, 87th Congress 1st Session, Senate Bill, pp. 16, 106-107, 113 20

Statutes

California Penal Code, Sec. 330 18

California Penal Code, Sec. 332 .....5, 6

United States Code, Title 18, Sec. 371 .....1, 3

United States Code, Title 18, Sec. 641 21

United States Code, Title 18, Sec. 1084 19

United States Code, Title 18, Sec. 1084(a) 19

United States Code, Title 18, Sec. 1084(b) 19

United States Code, Title 18, Sec. 1341 22

United States Code, Title 18, Sec. 1343 21

Page

United States Code, Title 18, Sec. 1952 ..... 1, 2, 4, 5, 6, 16, 18, 19, 20

United States Code, Title 18, Sec. 2314 ..... 1, 2, 4, 5, 20, 22

United States Code, Title 26, Sec. 7206(1) 1

United States Code, Title 28, Sec. 1254(1) 2

United States Constitution, Fifth Amendment 3, 24, 33, 43

IN THE

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October Term, 1970
No. .....

BENJAMIN TEITELBAUM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Benjamin Teitelbaum, Appellant below, respectfully petitions that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review that Court's affirmance of a Judgment of the United States District Court for the Central District of California, imposed after guilty verdicts by the jury, on February 3, 1969, of one Count of Conspiracy under 18 U.S.C. §371 to violate 18 U.S.C. §1952 and §2314, and of substantive offenses consisting of eleven Counts of violation of 18 U.S.C. §1952, two Counts of violation of 18 U.S.C. §2314, and one Count of violation of 26 U.S.C. 7206(1) [C.T. 2; 2022].[1]

[1]References to the District Court Clerk's Transcript of the Record are indicated by C.T. and to the Reporter's Transcript by R.T.

Opinion Below.

The opinion of the Court of Appeals below is reported at ..... F. 2d ..... (9th Cir. Sept. 28, 1970) and a copy is appended hereto as Appendix "A". A Petition for Rehearing was timely filed, and thereafter the Court below entered its Order Denying Petition for Rehearing without opinion (Appendix "B" to this Petition).

Jurisdiction.

1. The judgment of the Court of Appeals sought to be reviewed was entered September 28, 1970.

2. Petitioner timely filed his Petition for Rehearing and Suggestion for Rehearing *in Banc* which was denied on October 30, 1970.

3. This Court has jurisdiction to review the judgment below by Writ of Certiorari by virtue of Title 28 United States Code §1254(1).

Questions Presented for Review.

1. Is the crime of Larceny or Theft by Trick and Device in violation of State Law, which involves an interstate facility, a violation of 8 U.S.C. §1952? Do the first twelve Counts of the Indictment fail to charge a violation of 18 U.S.C. §1952, and has the evidence failed to prove any such violation?

2. Is knowledge that interstate travel or use of an interstate facility is contemplated or planned, an essential element of a conspiracy to commit offenses in violation of 18 U.S.C. §1952 and §2314?

3. Where the Indictment charges the accused of violating 18 U.S.C. §1952 and 18 U.S.C. §2314 as an aider and abettor, and there is no evidence proving

such charge as an aider and abettor, can a conviction of the substantive offenses be upheld upon the theory alone of guilt by conspiracy, without proof of knowledge of the use of interstate travel or of an interstate facility?

4. Was Petitioner effectively deprived of due process of law under the Fifth Amendment by reason of:

(a) Cross-examination by the Government of the witnesses, Lewin and Carson, as permitted by the trial court;

(b) The proceedings in the presence of the trial jury relating to two "unindicted co-conspirators", Gebhard and Snyder relating to "taking the Fifth" and the granting of immunity to Snyder;

(c) The admission in evidence of multitudinous telephone records and a chart summary thereof, without any proof of the identity of the parties or of the conversations taking place;

(d) In instructing the jury that if the existence of a conspiracy has been established it is presumed to continue until the contrary is demonstrated by the defendant?

Constitution Provisions and Statutes Involved.

The constitutional provisions and statutes involved[2] are

1. United States Constitution, Amendment V. No person shall be . . . deprived of life, liberty, or property, without due process of law;
2. Section 371 of Title 18, United States Code. If two or more persons conspire . . . to commit any offense against the United States . . . and

[2]The text of these provisions and statutes are fully set forth in Appendix C to this Petition.

one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned. . . .

3. Section 1952 of Title 18, United States Code. (Interstate travel or transportation in aid of racketeering enterprises)

(a) Whoever travels in interstate . . . commerce or uses any facility in interstate . . . commerce . . . with intent to

(1) distribute the proceeds of any unlawful activity; or

* * *

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), * * * and (3), shall be fined . . . or imprisoned . . . or both.

(b) As used in this section "unlawful activity means (1) any business involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States. . . .

4. Section 2314 of Title 18, United States Code. (Transportation of stolen goods, securities, monies).

Whoever transports in interstate . . . commerce any . . . securities or money, of the value of $5,000 or more, knowing the same to have been stolen . . . or taken by fraud . . . shall be fined . . , or imprisoned . . . or both.

5. Section 332, Penal Code, State of California. (Deering's California Codes—Penal).

> Every person who by the game of "three card monte", so-called, or any other game, device, sleight-of-hand, pretensions to fortune-telling, trick, or other means whatever, by use of cards or other implements or instruments . . . fraudulently obtains from another person money . . . shall be punished as in the case of larceny. . . .

Statement of the Case.

Appellant Teitelbaum is one of six defendants named in an indictment returned on December 21, 1967 by a Federal Grand Jury for the Central District of California. [C.T. p. 2.] The joint trial by jury, of five of the named defendants, Friedman, Jacobs, Richardson, Rosselli and Teitelbaum was commenced on June 11, 1968, and on December 2, 1968 the jury returned with various verdicts of guilty as to all five of the defendants. [C.T. p. 1690.]

The Charges Relating to Petitioner Are:

(a) *Count One—Conspiracy.*

The conspiracy as alleged charged one continuing conspiracy from about June 15, 1962 to December 21, 1967, the objects of which were to commit offenses (1) in violation of 18 U.S.C. 1952 by using facilities in interstate commerce to promote, establish and carry on an unlawful activity, namely fraudulent gambling in violation of California law (*California Penal Code* Section 332) and distribute the proceeds thereof, and, (2) to transport in interstate commerce, securities or money of a value over $5,000, knowing the same had been taken by fraud, in violation of 18 U.S.C. 2314.

It was alleged the activities were to be carried on at the Friars Club, 9900 Santa Monica Boulevard, Beverly Hills, and various devices and persons were to be used, involving travel in interstate commerce. Forty-six overt acts were alleged, ranging in time from January 14, 1963 to July 17, 1967.

Teitelbaum was named in only two of the overt acts, namely, No. 18, alleging that on April 10, 1963, he played gin rummy at the Friars Club with Mathes, and No. 21, alleging that on or about April 25, 1963 he received $10,000 in cash and two $10,000 checks from Corenson.

It was clearly the Government's theory that one of the objects of the conspiracy was the use of interstate facilities in executing a scheme to defraud persons playing gin rummy at the Frairs Club in Beverly Hills by the use of cheating devices, such as electronic signalling, which, it is contended, constitutes an *unlawful gambling activity, in violation of California Penal Code Section 332*, and therefore, this was in violation of 18 U.S.C. 1952.

(b) *Counts Two to Twelve (Violation of 18 U.S.C. 1952).*

In the first four of these counts, Teitelbaum is charged with having aided and abetted Friedman and Seach, or Seach in using an interstate facility to promote a business enterprise of fraudulent gambling in violation of Section 332 *Penal Code of California* at times ranging from February 18, 1963 to March 19, 1963. In Count Six he is charged with aiding and abetting Friedman and Rosselli on April 29, 1963 in using an interstate facility to distribute proceeds obtained from the business enterprise of fraudulent gambling in violation of *California Penal Code* Section 332.

In Counts Seven through Twelve, Teitelbaum is similarly charged, as an aider and abettor of Jacobs and Gebhard, or Gebhard in the business enterprise of fraudulent gambling on dates commencing on November 16, 1964 and ending on April 17, 1965.

(c) *Counts Sixteen and Seventeen (Violation of 18 U.S.C. 2314).*

The charge is aiding and abetting Friedman and Rosselli in transporting a $10,000 check, fraudulently obtained, from Los Angeles to Las Vegas and back.

(d) *Count Twenty-Three (26 U.S.C. 7260(1)).*

It charged that Teitelbaum falsified his 1963 income tax return in failing to report income derived from card-playing at the Friars Club.

Summary of Facts.

All of the allegations contained in the indictment as to all of the defendants stem out of alleged card-playing activities at the Friars Club in Beverly Hills, California. The Friars Club was founded about 23 years prior to the time of the trial of the case. During most of that time, it was located in the Beverly Hills area, its present location being at 9900 Santa Monica Boulevard, Beverly Hills, which has been its location since approximately 1960. The Friars Club is primarily a social club, but it has two branches, the Friars Club Foundation and the Friars Club of California. The social club rents the building from the Foundation [R.T. pp. 54-56.] The club has had a membership of approximately 450 persons, many of whom are prominent in the motion picture industry, as well as other businesses in the Beverly Hills-Hollywood area. [R.T.

p. 56.] Over a long period of years, various members of the club used the club facilities frequently for card-playing activities. [R.T. pp. 319-320.] Among the types of cards played were gin rummy, poker, klabiash, hearts and pinochle. Probably, the game most frequently played was gin rummy. This game was played in various ways. On occasion, the game would be played by two players playing opposite each other. On other occasions, the game known as rotation would be played, the game played by anywhere from four to six players. In this particular game, the partners would rotate. On other occasions, there were so-called "set" games, wherein two players as partners would play as fixed partners against two other players. The club kept a supply of cards and provided the members with chits wherein a member could sign a chit for so many decks of cards and there was also a charge of so much per person for the players playing in the game. It was the general custom among the members of the club that the winner would sign the chit. There were separate chits for food and liquor items. [R.T. pp. 349-350; 472-476; 566, 567; 2356-2357; 5316-5321.]

The indictment charged a continuing conspiracy, formed prior to June 15, 1962, and continuing until the date of the indictment, December 21, 1967. The unlawful agreement was formulated in late June and early July, 1962, by Friedman, who first used Douglas, then Seach to operate the peek. The plan was to play set games of gin rummy, primarily against club members Karl and Briskin, and to steal from them by means of winning the games by peeks installed in the ceiling over the card-playing area, through which the "peek man" could see the players' hands, and by use of an electronic device, signal information to the con-

federate playing in the game. Mathes was brought into the scheme as a "partner" at an early stage, about the first of July, 1962. Seach, a resident of Las Vegas, had interstate telephone calls from Friedman in Los Angeles County, and travelled from his place of residence to Beverly Hills with his electronic equipment to operate the peek. [R.T. pp. 329; 333-346; 435; 642; 644-646; 704-714; 722-726.] Over a period of several weeks, during July and August of 1962, and into September, a number of "games" were played, with Friedman and Mathes as partners playing set games, usually against Karl and Briskin. On occasion, some other club members substituted for Karl or Briskin. By reason of the cheating operation, Friedman and Mathes won substantial sums of money. [R.T. pp. 728-744.]

The only evidence concerning Teitelbaum's association with the conspiracy came by way of evidence given by Seach and Mathes. According to them, in the latter part of August, 1962, Mathes introduced Seach to Teitelbaum at the Luau Restaurant, owned by Mathes. Seach had been convicted of attempted burglary in the state court in Sacramento County, California. This was in connection with his tampering with telephone company coin boxes and pay telephones. This case was on appeal. Teitelbaum was asked to help him. [R.T. pp. 642; 777-779.]

Prior to August 1, 1962, Seach rented an apartment at 9913 Durant Drive, across the alley from the Friars Club. [R.T. pp. 729; 764-765.] In September 1962, Mathes brought Teitelbaum to Seach's apartment and introduced him as a "new partner" to the cheating scheme. [R.T. pp. 782-786.] Previously, Seach, Mathes and Friedman met periodically to divide up the stolen winnings. Friedman acted as bookkeeper.

Seach was always paid in cash. Originally, their percentages were: Friedman and Mathes 36½% or 37½ each; Seach 27% or 25%. [R.T. pp. 728-744.]

Seach was told, when Teitelbaum was brought in, that each of the four would get 25%.[3] Although Teitelbaum was a partner, he never played in any crooked games with either Friedman or Mathes (except on April 10, 1963, which is described as the "Corenson Game"). [R.T. pp. 4169; 4221-4222.]

On April 10, 1963, a set game was arranged between Irving Link, a club member, and Teitelbaum as partners, against Joe Benaron, a club member who infrequently visited the club, and Richard Corenson, a non-member (the Corenson game). This game had been arranged at a social gathering at the Brentwood Country Club. [R.T. pp. 3046-3048.] Again, according to Seach and Mathes, Teitelbaum advised Mathes of this game, who in turn, arranged for Seach to operate the peek, Mathes to relay signals to Teitelbaum. Link was not told of the cheating operation. The game started late in the evening. Mathes sat next to Teitelbaum and relayed signals, which Teitelbaum failed to follow. After an hour or so, Link and Teitelbaum had lost $4,000, whereupon Seach signalled Mathes to get into the game. By some pretext, Link was caused to give up his place to Mathes, whereupon Mathes and Teitelbaum proceeded to win. The game ended at closing time, early the following morning. [R.T. pp. 871-876; 4011-4014; 4018.]

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[3]Mathes testified that the arrangement was of short duration, perhaps a week or two. Also, in conflict with Seach, he said Friedman brought Rosselli in as a partner at about the same time he, Mathes, brought Teitelbaum. [R.T. pp. 853-854; 4126-4127.]

According to Corenson and Seach, Corenson lost about $50,600. He wrote out counter checks of the type left at the Friars Club, one for $7,600 to Link, [Ex. 34-A], one for $13,000 to Mathes, [Ex. 34-B], three for $10,000 each to Teitelbaum. None of these checks were produced.

Seach never again participated in any card-playing activity at the Friars Club. Mathes likewise never participated in any "electronic cheating" at the club thereafter. According to him, Teitelbaum likewise quit. Mathes played in a few unplanned cheating games, where an observer would stroll by and give an audible signal informing what an opponent may have had. Teitelbaum did not participate. Thus, the case of the prosecution affirmatively established this conspiracy ended along about April or May, 1963. [R.T. pp. 4026-4028; 4037; 4159-4161; 4269; 4483-4485; 4541.]

Petitioner, a long-time member of the Friars Club, was a substantial business man in Hollywood and Beverly Hills. [R.T. 2168]. There is no evidence that Teitelbaum knew of the travels of Friedman and Seach from Las Vegas to Beverly Hills. Mathes purportedly brought Teitelbaum into the conspiracy. Seach was living in an apartment in Beverly Hills. [R.T. 782-786; 729; 764-765.] Of the multitudinous telephone records of calls made between Gebhard's number in Florida, Jacob's number in California, Friedman's numbers, Seach's numbers, or from hotels in which Friedman may have been registered, throughout the years from 1962 to 1967, there is a record of only one call from a hotel room in Beverly Hills registered to Friedman to the home telephone number of Mr. Teitelbaum [Ex. 58-A]. In short, there is no evidence

of Teitelbaum's participation in the use of an interstate facility or that he agreed to any scheme in which the use of this facility was reasonably to be expected.

The Beverly Hills Hotel Incident.

In the government's case in chief, over objection, the trial court allowed Seach to introduce evidence of a purported installation of a "peek" in a bungalow occupied by Ted Lewin in December, 1962, at the Beverly Hills Hotel. [R.T. pp. 2040, 4079]. Seach claimed he saw Teitelbaum there at the hotel at that time. This was permitted, because on cross-examination of Seach, Teitelbaum's counsel sought to establish Seach never met Teitelbaum until May of 1963. [R.T. pp. 1608; Exs. TB and TC; R.T. pp. 2021, 2025-2027.] Mathes was also permitted to testify relative to this evidence. Petitioner was required to offer evidence to refute it. Along with other evidence, he called Ted Lewin as a witness to prove he, Teitelbaum, had never been seen by Seach. [R.T. pp. 9709-9710.] The Government then cross-examined Lewin relative to specific unrelated matters involving gambling activities. [R.T. pp. 9736-9737; 9746; 10418;10426] which resulted in the witness obtaining counsel and claiming the privilege under the Fifth Amendment.

The Witness Pauline Carson.

This witness was called to impeach the unindicted "peek-man", George Seach, by establishing he was mentally ill. She was an intimate acquaintance. [R.T. pp. 9848-9851; 9956; 10016-10256.] She was cross-examined relative to activities in the nature of being a cheating dealer in certain Nevada casinos. [R.T. pp. 10085-10108.]

The Unindicted Co-Conspirators, Gebhard and Snyder.

There was no direct proof of any continuance of the conspiracy or of the specific games after Seach left in April, 1963. The indictment had charged that Edwin Nathaniel Gebhard and Albert Snyder were unindicted co-conspirators. The conspiracy charge alleged Gebhard was involved in six of the overt acts charged during the period of time from April 23, 1963 to July 17, 1967, and that he was a principal in Counts Seven through Twelve, ranging from November 16, 1964 to April 17, 1965. [C.T. pp. 2-18.] Although Snyder was not named in any of the overt acts charged, or in any of the substantive counts, he, along with Gebhard had been mentioned in some detail in the Government's Opening Statement. [R.T. pp. 33-38; 41, 43-45.] The government, in summing up, admitted that the proof was entirely circumstantial after Seach and Mathes (the only two witnesses that implicated Teitelbaum) had terminated their cheating activities. [R.T. p. 14547.]

The trial court had ruled there was no evidence to establish that defendant Jacobs joined the conspiracy until after April 10, 1963 [R.T. p. 15772] which was the last date upon which Seach "peeked" a game. It was clearly the government's theory that Gebhard was a new "peek-man" being brought in by Jacobs, and Snyder was in a like position. With only telephone records of telephone calls between numbers listed to Jacobs and Gebhard [Ex. 58-A] and certain other evidence (Gebhard had been seen on the premises, articles found above the ceiling), Snyder was produced before the jury when it was known he would claim the privilege, and was asked implicating questions he

refused to answer. [R.T. pp. 5174-5176.] This process was repeated after Snyder had been granted immunity, and again refused to testify. [R.T. pp. 5239-5243.] Likewise, Gebhard was called as a witness by the Government. [R.T. p. 5531.] Again the prosecution knew in advance that Gebhard would refuse to testify. [R.T. p. 5533.] At a meeting at the side bar, Mr. Balabon was appointed as counsel for Gebhard [R.T. pp. 5537-5538] and Gebhard left the stand to talk to counsel. Later, Mr. Balabon advised the government that Gebhard would refuse to testify and the government requested that Gebhard *be called and interrogated* in the absence of the jury. [R.T. p. 5559.] Gebhard was then called outside the jury's presence and refused to testify invoking his testimonial privilege. [R.T. p. 5559.] The court, after a long colloquy with all counsel, granted the government's application for immunity for Gebhard. [R.T. p. 5573.] Then again, in the *absence* of the jury, the government asked Gebhard questions which he refused to answer. [R.T. p. 5573.] Mr. Nissen then suggested that the jury be informed that Gebhard refused to testify. [R.T. pp. 5577-5578.] All counsel objected to this and challenged Nissen's good faith in calling Gebhard and then making such a request. [R.T. pp. 5578-5582.] The defense requested that no mention of the refusal be made to the jury. [R.T. p. 5582.] The court then admonished the jury, thus again allowing them to draw inferences from Gebhard's refusal to testify. [R.T. p. 5586.] This was particularly damaging, for Gebhard had been named in the indictment as a co-conspirator and had been identified often in the courtroom prior to his being called to the witness stand. [R.T. p. 5577.]

The Telephone Records.

The trial court, over objection, permitted in evidence numerous hotel records (Beverly Rodeo Hotel, Exhibits 49a-49g, 50a-50f; Beverly Crest Hotel, Exhibits 52a-52c, 53a-53d, 54a-54vvv, 55a-55t, 56a and 56b, 76a-76d; Wilshire House Hotel Exhibits 208-A-208AA, 209; Beverly Hillcrest Hotel, Exhibits 674A-67H) for the purpose of establishing telephone calls between certain co-conspirators. For the same purpose records of telephone companies or copies of records, proving calls to or from telephone numbers listed to Friedman, Gebhard, Jacobs, Snyder, Seach and others, (Central Telephone Company, Las Vegas, Nevada, Ex. 207a-207i; General Telephone Company Ex. 668A and 668B; Southern Bell Telephone Company, Ex. 69; [R.T. p. 3955]) were admitted over objection. These various records as to telephone calls were summarized by charts. [Ex. 58A, R.T. p. 5594; Ex. 221, R.T. p. 5587.]

From all of these records, only one call was with reference to a number listed to the Teitelbaum family. The records covered a period of years from 1962 to 1967. [Ex. 58A.] Without any proof as to the identity of the parties conversing, or the contents of the conversation, the jury was permitted to infer those facts under the trial court's instructions and comments. [R.T. pp. 15754-15755.]

ARGUMENT.

A. The Questions Presented for Review Justify the Granting of Certiorari.

1. The court below has unduly extended the application of Section 1952 (Title 18) to include any offense which relates even remotely to some activity involving wagering on cards to constitute a gambling offense in violation of state law. This is an important question of federal law which, in our judgment, has not been, but should be, settled by this Court.

2. The holding, by the Court below that "There is therefore no rational basis for holding that such knowledge is an essential element of a conspiracy to commit the offenses created by the substantive sections" and that proof of knowledge of the jurisdictional element (use of the interstate facility) is as irrelevant to the purposes of the general conspiracy statute as it is to the purposes of the substantive statutes." (Appendix "A", Opinion pp. 14, 15) is in conflict with settled principles of law, decisions by the Courts of Appeal (*United States v. Edwards*, 366 F. 2d 853, 869, 2nd Cir. 1966; *United States v. Fellabaum*, 408 F. 2d 220, 223-224, 7th Cir. 1969; *United States v. Barnes*, 383 F. 2d 287, 6th Cir. 1967) and of this Court (*Pereira v. United States*, 347 U.S. 1, 12-13, 1954; *Ingram v. United States*, 360 U.S. 672, 677, 1959). The importance of holding that proof of the conspiracy need not embrace proof of an agreement involving the use of interstate facilities is demonstrated by the further holding of the court below, that one charged as an aider and abettor in the substantive counts, may be convicted solely upon establishing his participation in the unlawful agreement.

3. The Court of Appeals, in holding: first that if "the Government pressed too hard" in the cross-examination of the witnesses Lewin and Carons, "the error does not justify reversal" (Opinion, Appendix "A" p. 34), and that the error surely was *de minimus;* second, the circumstances surrounding the calling of co-conspirators Gebhard and Snyder, and proceedings relative thereto, had in the presence of the jury is clearly inapposite to the position taken by Judge Hand in *United States v. Maloney*, 262 F. 2d 535, 537 (2nd Cir. 1959), and could only have and did result in great prejudice to Petitioner, who was in no way, by circumstance or otherwise, shown to have been connected with any activities, proven or unproven, concerning Jacobs, Snyder, Gebhard or Friedman during the time contended by the government that Jacobs and Gebhard were involved, and surely added critical weight to Petitioner's conviction of Counts One, and Seven through Twelve inclusive; third, the admissibility of innumerable records of unidentified telephone calls (other than the bare records of calls from one number to another number, *e.g.*, Jacobs' number in California to Gebhard's number in Florida, coupled with the jury's being clearly advised that it could conclude such calls were between the conspirators, relative to the conspiracy, resulting in overt acts), all effectively deprived Petitioner of his right to due process in this trial resulting in depriving him of his liberty and his property. This is a sanctioning of so great a departure by the trial court from the accepted and usual course of judicial proceedings, that it calls for the exercise by this Court of its power of supervision.

B. Discussion of the Points Raised.

1. State of California Penal Code Section 332 Is Not a Gambling Offense in Violation of State Law and the Charges and Proof Relating to Counts One Through Twelve of the Indictment Do Not Constitute a Violation of 18 U.S.C. Section 1952.

The lower court holds that §1952 embraces a more inclusive category than "illegal gambling", to wit: "gambling . . . offenses" and that cheating at gin rummy for profit comes within the ambit of gambling offense. (Opinion, Appendix "A", pp. 6-9.) It seems clear from reading the Opinion, that the court concedes gin rummy does not come within the prohibitions of Penal Code §330.[4] It follows, that playing gin rummy is not "gambling" an "offense in violation of State or Federal Law." As a matter of fact, the government never attempted to prove that playing gin rummy was "gambling". The statement that §1952 "speaks not of illegal gambling, but of a more inclusive category: 'gambling . . . offenses.'" seems quite self-contradictory. Gambling which violates state law, is an offense, hence, illegal gambling. Likewise, gambling in violation of a federal law is a gambling offense, and equally illegal.

We cannot agree that *Turf Center, Inc. v. United States*, 325 F. 2d 793, 795 (9th Cir. 1963), supports

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[4]Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noirse, rondo, tan, fan-tan, stud-horse poker, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of said prohibited games, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars nor not more than five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

the interpretation sought to be placed uppon it. There the court said:

> "Admittedly this operation involved betting and wagering on sporting events, occurring from time to time throughout the United States, in violation of the anti-gambling laws of the State of Washington." (p. 795).

That case only stands for the clear proposition that the word "gambling" is not restricted to gambling as it was known at common law, on the contrary, it must have reference to *gambling which is an offense* in violation of the laws of the State in which it was committed. Nor does *United States v. Bergland*, 218 F. 2d 159, 161 (7th Cir. 1963) give authority for the lower court's conclusion. The charge there was violating and conspiring to violate Title 18, §§ 1084 and 1952, United States Code. Section 1084(a) charged a gambling offense in violation of the laws of the United States—being engaged in the business of betting or wagering and *knowingly using* a wire facility for the interstate transmission of bets or wagers or for assisting in placing bets or wagers on sporting events. Even that activity was not illegal, if the wagering was legal in the state where the sporting event occurred and the information was transmitted to another state in which such wagering or betting was legal (Section 1084(b)). Consequently *Bergland* holds that the gambling activity prohibited by Section 1084 (which is clearly one part of a gambling enterprise) is a gambling offense in violation of Federal law, only however, because of the further limitation that wagering is a gambling offense in one or the other of the state involved.

Section 332, California Penal Code[5] is not a gambling offense. It is larceny—stealing by any number of tricks or devices—including the playing of cards—whether gin rummy, bridge or any other kind of a card game.

We are thoroughly in accord with the statement of the court below that "This case does not involve cheating incidental to a lawful gambling enterprise. There was no business enterprise involved, lawful or otherwise, absent the cheating. In conception, organization, and execution, appellants' business enterprise was that of cheating at gin rummy for profit; and such a business enterprise was illegal under California Penal Code section 332."

This was stealing, larceny which did not involve gambling whether lawful or unlawful. Section 1952 was specifically intended to exclude obtaining money by fraud.[6]

2. An Essential Element of Conspiracy to Violate Sections 1952 and 2314 as Prohibited by Section 371, Title 18, United States Code Is the Agreement to Use Interstate Facilities in Travel or Interstate Commerce.

The lower court reasons that proof of knowledge of the use of interstate facility is not essential in establishing the violation of the provisions of either §1952 or §2314. (Opinion, Appendix "A", p. 14.) All of the cases referred to, relating to the substantive offenses,

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[5]The provisions of California Penal Code §332 are set forth in Appendix "C".

[6]Hearings, Senate Committee on Judiciary, 87th Congress 1st Session, Senate Bill, pp. 16, 106-107, 113.

refer to principals who actively *used* the interstate facility, or aided and abetted some one who did.[1]

The lower court fails to recognize that the crime of conspiracy is the unlawful agreement to commit acts which are criminal. The entire gravamen of the offense is the combination or the agreement. It's holding that "Such knowledge (the intended use of an interstate facility) is as irrelevant to the purposes of the general conspiracy statute (footnote omitted) as it is to the purposes of the substantive statutes," (Opinion, Appendix "A", p. 15) is completely erroneous, and contrary to the court's assertion that several decisions have merely assumed the need of such proof; the cases referred to, in direct conflict with the court below, declare such knowledge *must be a part of the agreement.*

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[1]For example, in *United States v. Blassingame*, 427 F. 2d 329 (2nd Cir. 1970) the court held that when in fact the interstate wire was used, it was not necessary to prove knowledge that it was in fact an interstate facility, the charge being a violation of U.S.C. §1343. However, see *United States v. Houlihan*, 332 F. 2d 8 (2nd Cir.) cert. denied, 379 U.S. 828, 85 S. Ct. 56, 13 L. Ed. 2d 37 (1964), holding that it is sufficient if the use of the interstate facilities were the foreseeable results of Houlihan's acts. Likewise, *United States v. Howey*, 427 F. 2d 1017 (9th Cir. 1970) involving theft of submarine parts owned by the United States (18 U.S.C. §641) holds knowledge of government ownership is not essential (The Court declined to follow a *contra* holding in *Findley v. United States*, 362 F. 2d 921 (10th Cir. 1966). *Baker v. United States*, 429 F. 2d 1278 (9th Cir., 1970) involved both the substantive offenses of violations 18 U.S.C. §641, and conspiracy to violate that offense, (Receive, conceal and convert property of the United States.)
The trial court instructed that knowidge that the property stolen belonged to the United States was not necessary to establish guilt. No question was raised before either the trial or appellate court. (*Baker v. United States*, 393 F. 2d 604 (9th Cir., 1968) cert. denied, 393 U.S. 836, 89 S. Ct. 110, 21 L. Ed. 2d 106). *Baker* without discussing the conspiracy question, relied on *Howey* and *Bolin* (423 F. 2d 834, 9th Cir., 1970) neither of which involved conspiracy.

In *Pereira v. United States*, 347 U.S. 1, 74 S. Ct. 358, 98 L. Ed. 435 (1953) the petitioners were charged with substantive offenses of violating 18 U.S.C. §1341 (mail fraud) and §2314 (transporting stolen property) and conspiracy to commit those crimes. This Court clearly considered the difference between the intent to use interstate facilities and the actual use with reference to the substantive offenses (pp. 8, 9). But, with reference to the conspiracy charge, it is clearly pointed out that the essence of the charge is the agreement. (p. 11.) Chief Justice Warren states (pp. 11-12):

> "Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States and it cannot be said that the substantive offenses and the conspiracy are identical, any more that that the two substantive offenses are identical.
>
> "Petitioners further contend that there was no evidence that they *agreed* to use the mails in furtherance of the scheme to defraud Mrs. Joyce or that they *agreed* to transport stolen property in interstate commerce. It is not necessary that an agreement to use the mails or transport stolen property exists from the inception of the scheme to defraud. If there was such an agreement at any time, it is sufficient."

The fundamental principle that there must be proof that the agreement is to commit a crime against the United States is reiterated in *Ingram v. United States*, 360 U.S. 672, 79 S. Ct. 1314, 3 L. Ed. 2d 1503 (1959) at pp. 677-678.

Other cases also standing for the principle that each conspirator must have knowledge that the agreement involves the element of the use of interstate facility or interstate transportation are *United States v. Edwards*, 366 F. 2d 853, 869 (2nd Cir. 1966) and *United States v. Barnes*, 383 F. 2d 287, 292-293 (6th Cir. 1967), wherein the court comments at length on the holding in *Twitchell v. United States*, 313 F. 2d 425 (9th Cir. 1963) which definitely requires more than a modicum of circumstantial proof of knowledge of the interstate activity where the charge is conspiracy, and *United States v. Fellabaum*, 408 F. 2d 220, 223-224 (7th Cir. 1969). These cases, and others therein relied upon demonstrate a direct contradiction to the statement of the court below that knowledge of the interstate aspect is irrelevant to proof of the conspiracy, and that such cases have merely "assumed" the need of such proof.

In our statement of the case, we have referred to the lack of evidence to connect Teitelbaum with any part of the scheme involving the use of interstate facilities. It must be conceded there is no circumstantial evidence connecting him with interstate telephone calls [Ex. 58-A], transfer of funds in interstate travel, (see *infra*, Point 3), interstate travel by Friedman, Gebhard, Seach, or anyone else in any way connected with the conspiracy or the substantive offenses. His participation is not comparable to that of *Pereira*.

The participation of Teitelbaum in the conspiracy does not fall within the categories described in *United States v. Corallo*, 413 F. 2d 1306, 1326-1327 (2d Cir. 1969); *Grimes v. United States*, 379 F. 2d 791, 795-796 (5th Cir. 1967); *Nassif v. United States*, 370 F.

2d 147, 152-153 (8th Cir. 1966). The fact, however, that in those cases, proof of knowledge was considered relevant in the conspiracy charge further demonstrates the clear error of the lower court, warranting certiorari.

3. Guilt of the Substantive Offenses of Violation of 18 U.S.C. Sections 1952 and 2314 Cannot Be Upheld, When Petitioner Was Indicted as an Aider and Abetter, and Conviction Rests Solely on Guilt as a Conspirator, Without Agreement Involving the Use of Interstate Facilities.

The lower court has held that knowledge of the use of interstate facilities is irrelevant to prove the charged conspiracy, and that under *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) Petitioner's conviction of the substantive counts can be sustained if such offenses were committed in furtherance of the conspiracy, conceding petitioner knew nothing of the specific transactions. This contention emphasizes our argument, that the *Pinkerton* theory has broadened the indictment and has denied Petitioner of due process under the provisions of the Fifth Amendment (Opinion, Appendix "A" pp. 19-20). The court below concedes, as the trial court ruled, that there was no evidence to submit to the jury that would support a conviction as an aider and abettor. The requisite proof to establish guilt as an aider and abettor is discussed in *Grimes v. United States*, 379 F. 2d 791, 795 (5th Cir. 1967). To hold that guilt can be established upon the theory of conspiracy, absent proof of the agreement to use the interstate facility, expands beyond any previous decision, guilt of substantive crimes under the theory of conspiracy. Prejudice to Petitioner is more than apparent.

4. Petitioner Has Effectively Been Deprived of Due Process by a Combination of Prejudice and Plain Errors.

The cumulative effect of the erroneous admission of certain evidence, by highly improper and inflammatory cross-examination, by proceedings in the presence of the jury relating to unindicted co-conspirators Gebhard and Snyder, and by permitting business records in the nature of telephone calls to be the basis of proof by speculation under the guise that such constituted proof by circumstantial evidence, resulted in great prejudice, and its effect upon the trial jurors was so pronounced that their verdict of guilt was inevitable. The combination of these factors was much more devastating than the effect of any one of them would have been.

(a) *The Cross-Examination of the Witnesses Lewin and Carson.*

Ted Lewin

The lower court gives the incident involving Lewin "only brief consideration" (Opinion, Appendix "A", p. 32), stating his testimony related to only a collateral issue. Seach, a confessed conspirator and professional "peek-man", was the Government's principal witness. He testified that in September, 1962, Mathes, likewise a confessed conspirator and principal in card playing with Friedman, brought Teitelbaum to Seach's apartment in Beverly Hills and introduced him as a "new partner" in the cheating scheme [R.T. 782-786]. Near the close of his direct examination, Seach related two telephone conversations with Petitioner Teitelbaum occurring in September or October, 1967 [R.T. pp. 1099-1104]. On cross-examination, counsel for Petitioner examined Seach in detail based upon tape recordings of these exact telephone conversations, [Ex. TB and

TC] and the tapes revealed certain conflicts including the question as to when Seach first met Teitelbaum [R.T. p. 1608]. The tapes and their contents when disclosed to the jury, by admonition of the trial judge were admitted solely with respect to the question of impeachment of Seach. [R.T. p. 1909]. Thereafter, on redirect examination and over strenuous objection, the court permitted the Government to introduce evidence through Seach that in December, 1962, he installed a peek in the Beverly Hills Hotel in conjunction with Friedman, Teitelbaum, Mathes and Lewin. [R.T. p. 2039]. Mathes was likewise permitted to testify concerning this incident. [R.T. p. 4078]. This evidence was admitted prior to any evidence being introduced by Petitioner other than with relation to the telephone conversations we have mentioned. We have urged this evidence was erroneously admitted under the holdings in *United States v. Byrd*, 352 F. 2d 570 (2nd Cir. 1965); *Devore v. United States*, 368 F. 2d 396 (9th Cir. 1966); *United States v. Birns*, 395 F. 2d 943 (6th Cir., 1969).

In order to meet this "collateral issue" it became necessary for Petitioner to disprove the truth of the testimony of Seach and Mathes. In addition to his own testimony, that of Friedman and testimony of a Government witness whose testimony was later stricken, Petitioner called Ted Lewin to rebut this evidence. Prior to calling this witness, counsel requested a conference in chambers to limit the cross-examination of Lewin. Extensive colloquy followed wherein counsel endeavored to have the court rule in advance limiting the Government's cross-examination to matters touched on direct examination. [R.T. pp. 9690-9703]. On direct examination, Lewin testified that Teitelbaum was not

present at the Beverly Hills Hotel during the time in question. Lewin did not know George Seach nor did he see him at the hotel at that time, nor was there any arrangement between Seach, Mathes, Lewin, Teitelbaum and Friedman to set up a peek at Lewin's Beverly Hills Hotel bungalow. [R.T. pp. 9709-9710]. On cross-examination, Lewin was asked his occupation and stated he was presently employed in the fertilizer business representing a corporation in Madrid, Spain. [R.T. p. 9713]. Thereafter, the Government was permitted to cross-examine the witness in the specific area of asserting wrongful acts of conduct not amounting to conviction of crime. The questions were so framed as to suggest they were based on specific and detailed information in the possession of the Government. As a matter of fact, the prosecutor represented to the court that he knew the witness was lying. [R.T. p. 9739]. Without relating the entire record, the following are examples of questions insinuating wrongful conduct on the part of Ted Lewin:

"1. '. . . in December of 1966 did you now [not?] ask George Seach to return to Europe with you to assist in installing magnets on roulette wheels in your European casinos?' [Tr. 9763]

"2. 'Have you ever on any occasion, Mr. Lewin, discussed the switching of crooked dice in dice games with George Seach?' [Tr. 9737] The same question, in slightly different form, was repeated. [Tr., 9744.]

"3. 'Do you meet peekhole men all over, Mr. Lewin?' [Tr. 9746.]

"4. '. . . [H]ave you ever used a peekhole in a card game.' [Tr. 9831.]

"5. '. . . have you ever owned a joint ["a transmitter-receiver operation type thing" Tr., 9832, lines 6-7] or any type of electronic equipment to be used for cheating?' [Tr., 9832.]

"6. 'Now . . . does your business include the shipment of gambling paraphernalia?' [Tr., 9833.]

"7. In '1968 did you arrange for the shipment of 40 slot machines from Reno, Nevada, to the Tinsia Corporation at Zurich, Switzerland?' [Tr., 9833.]

"8. '. . . have you ever knowingly participated in a game where a peekhole was being used?' [Tr., 10423.]

"9. 'Is it not a fact that Mr. Jim Houston has on occasions sent you signals in card games with electronic devices for the purpose of cheating?' [Tr., 10425.]"

All of these questions were presented and answers elicited over strenuous objection. It became apparent by the nature of the cross-examination that the prosecution seemed interested in trying to lay a foundation for a perjury conviction of Lewin. [R.T. pp. 9738, 9751-9752.] The cross-examination of this witness was interrupted in order to advise the witness of his constitutional right not to incriminate himself. [R.T. pp. 9833-9836.] When the witness later returned to complete his testimony, he had obtained the services of an attorney. It was at that time that he was asked the question, "Now, Mr. Lewin, in 1968, the current year, did your business include the arrangement of the shipment of 40 slot machines from Reno, Nevada to the

Tinsia Corporation at Zurich, Switzerland?" The attorney who was then in court to represent Mr. Lewin announced that he wished to confer with the witness. The court granted that permission. Thereafter, the question was reiterated to the witness who then answered, "I refuse to answer this question on the grounds that it may tend to incriminate me." The Government then proposed to ask additional questions when the court interrupted stating, "Just a moment, Mr. Uelmen. I think in view of the answer that he has made to the last question, it becomes unnecessary to ask further questions of the nature that we have been discussing." Upon pointing out to the trial judge that the court's remarks implied that other questions along the same line could properly be asked, the trial judge attempted to correct the error by telling the jury he did not imply that the asking of further questions along the same lines would elicit similar responses. Nevertheless, the court permitted the Government to then inquire whether the witness had ever knowingly participated in a game where a peekhole was being used or where a transmitting-receiving device was being used to cheat and whether the witness knew a man by the name of James Houston. Then the prosecutor asked the witness, "Is it not a fact that Mr. Jim Houston has on occasions sent you signals in card games with electronic devices for the purpose of cheating?" The witness again consulted with his attorney and then answered, "I refuse to answer that question on the ground it may tend to incriminate me." [R.T. pp. 10418-10426.]

To emphasize the devastating effect of this line of examination and contrary to the remarks of the court below that this was testimony relating to a collateral issue of minor significance, we point out that the trial

judge in commenting on the evidence at the conclusion of the case, while instructing the jury, said:

> "Now in determining whether or not Mr. Teitelbaum was guilty as charged, there are some straws in the wind or some facets of the testimony over which you will want to pass your minds. This Beverly Hills episode, Beverly Hills Hotel episode, is one of them. These people aren't accused of conducting peep operations at the Beverly Hills Hotel. The only significance of the Beverly Hills Hotel episode insofar as Mr. Teitelbaum is concerned—this was in the fall or in December, I guess, of 1962—where both Seach and Mathes said that Teitelbaum was there and was going to play pursuant to peeping signals against Sam Anderman, I think it was, and both Mathes and Seach say that Teitelbaum saw Seach right there, they worked together. If that is so, if you believe, that would indicate, first, an acquaintance between Teitelbaum and Seach, *and a willingness on Teitelbaum's part to participate in these peek operations, and if he was willing to do it in the Beverly Hills Hotel and knew Seach, you might very well find that significant in determining whether or not Teitelbaum actually was a partner in that same type of operation at the Friars Club.*" [R.T. p. 15744, lines 6-25; p. 15745, lines 1-2.] (Emphasis added.)

Pauline Carson

Mrs. Pauline Carson was called by defendants to prove that the key witness, Seach, was mentally ill, and that from certain bizarre behavior on his part, his veracity and accuracy as a witness was suspect. [R.T.

pp. 9848-9851; 10016-10036.] The trial court permitted the Government to ask questions trying to elicit answers admitting she was a card cheat, and biased in favor of Las Vegas gambling interests. Examples of this line of questioning are:

> "Q. Now Mrs. Carson, have you not worked as a cheating second dealer for the several casinos that Mr. Seach has told the Government about?" [R.T. p. 10085, lines 4-6.]
>
> "Q. Mrs. Carson, you have been a cheating second dealer for several casinos, have you not, in Las Vegas and elsewhere?" [R.T. p. 10098, lines 11-14.]
>
> "Q. You did work in the Cal-Neva Lodge in Las Vegas as a cheating second dealer, didn't you?" [R.T. p. 10099, lines 12-13.]
>
> "Q. It is true, is it not, Mrs. Carson, that you have acted—you have used a second shoe or acted as a cheating second dealer with these people: William Douglas—
>
> "Q. —In Las Vegas?" [R.T. p. 10107, line 25, to p. 10108, lines 1-3, 7.]

After permitting this type of question of the two witnesses, the trial judge three days later ruled that in spite of denials of the witnesses, the Government would not be permitted to prove the suggested wrongful acts, it would take the trial too far afield. [R.T. 10403.] Nevertheless, the court refused to strike the questions and answers, and admonish the jury. [R.T. p. 10402.]

The cross-examination of these two witnesses, permitted to remain in the record, is clearly in violation of settled principles of law, enunciated in many decisions.

This is illustrated in *Homan v. United States*, 279 F. 2d 767, 771 (8th Cir. 1960), citing other 8th Circuit cases; *Roberson v. United States*, 249 F. 2d 737, 742 (5th Cir. 1957); *Leary v. United States*, 383 F. 2d 851, 857 (5th Cir. 1967); *Ramirez v. United States*, 294 F. 2d 277, 284 (9th Cir. 1961); *Thurman v. United States*, 316 F. 2d 205 (9th Cir. 1963); *Courtney v. United States*, 390 F. 2d 521 (9th Cir. 1968); *Hudson v. United States*, 387 F. 2d 331 (5th Cir. 1967). The prejudice is compounded by allowing inquiry of collateral matters resulting in the witness, in the presence of the jury, taking the privilege. The jury can only reach one conclusion, that the witness was lying. To expose a witness to questions directed at specific, unrelated wrongful acts, requiring a judicial admission, or on the other hand, a possible prosecution for perjury, is to effectively make it impossible for an accused to procure evidence in his own defense. This coercive threat deprives him of the right to due process.

(b) *The Proceedings Had in the Presence of the Jury Relating to the Un-indicted Co-Conspirators, Gebhard and Snyder, Added Critical Weight to the Prosecutor's Case.*

Pyramided on the prejudicial cross-examination of Lewin, are the proceedings relating to Gebhard and Snyder. Also relating to those proceedings, are the records of numerous telephone calls between Gebhard's number and that of Jacobs. It must be remembered in Counts Seven to Twelve, Petitioner is charged as an aider and abettor of Jacobs and Gebhard. The only evidence relating Petitioner to Gebhard was testimony by Seach that on July 10, 1963, in response to a question by Seach whether Teitelbaum knew Pete

Gebhard, Teitelbaum replied "Yes", "But he likes to drink too much and nightclub." [R.T. p. 930]. With reference to Snyder, the sum of the evidence was from cross-examination of Petitioner by the Government. He said he met Snyder when on a visit to Miami, Florida. He met Snyder at that time, and they played cards together. [R.T. pp. 11984-11991.]

The evidence pointing to Snyder as a co-conspirator was exceedingly sparse:

1. A blue sweat shirt found in the ceiling of the Friars Club—with nothing to identify it as ever having been possessed by Snyder. [Ex. 13, referred to in argument to the jury. [R.T. p. 14557.]

2. Money order and checks from Jacobs to Snyder [Exs. 218, 220.]

3. Testimony by Seach of prior peek activities elsewhere. [R.T. pp. 2036, 2038.]

4. Hotel and telephone records of Friedman and Snyder [Exs. 54-A; 54Q, 54JJJ.]

The Government in the presence of the jury called Albert Snyder as a witness. [R.T. p. 5174.] He was sworn, stated his name and then a brief colloquy was had at the bench. During this conference the court stated that it had been apprised that Snyder would take the Fifth. The Government also acknowledged the fact that *they knew that Snyder would refuse to testify.* [R.T. pp. 5174-5176.] "Mr. Nissen: Your Honor please, in view of the situation disclosed at the bench which was previously known to us for which we intended to have the jury excluded, the Government

would like to ascertain in their absence whether or not this privilege of Mr. Snyder's is, in fact, exercised. If so, then we would ask the court to rule on it." [R.T. p. 5176, lines 13-19.]

Then outside the presence of the jury on direct examination of Snyder, the following questions and answers were given:

"By Mr. Nissen:

Q. Mr. Snyder, where do you reside?

A. 8018 Beverly Bouleverd.

Q. What is your occupation?

A. I refuse to answer.

Q. On What ground ?

A. It may tend to incriminate me.

Q. Now, sir, during the period 1964 through 1967, sir, have you ever had occasion to operate peekholes in the Friars Club in connection with Mr. Ricky Jacobs?

A. I refuse to answer on the ground that it may incriminate me.

The Court: All right. I think we have gone far enough." [R.T. p. 5180, lines 10-24.]

The Government then made application to the court that Snyder be given immunity. [R.T. p. 5189.] The court granted the application [R.T. pp. 5189-5196] and the court was recessed for the day. The next morning an extended conference took place in chambers regarding the upcoming testimony of Snyder. Richard Sherman at this time informed the court and the United States attorneys that even though his client had been given immunity, he had advised him *not* to testify. [R.T. p. 5227.]

Thereafter Snyder was recalled as a witness and in the presence of the jury, the court made the following statement:

> "The Court: Well, Mr. Snyder, you will recall that yesterday afternoon the court signed an order granting you immunity with respect to anything concerning which you may testify, pursuant to questions in this case.
>
> That means that in responding to the questions asked in this case your answers may not tend to incriminate you because by the signing of this order you are granted immunity from any such prosecution that might be based upon answers that you would give in this case." [R.T. p. 5239, lines 13-23.]
>
> Accordingly, irrespective of the fact that yesterday before the grant of immunity you declined to answer the first questions of Mr. Nissen, I now instruct you that the questions are relevant to the issues here concerned and you will be required to answer.
>
> I will also instruct you that you have nothing to fear from any action by the Government in answering the questions so long as you tell the truth according to the best of your ability.
>
> Is there anything else that occurs to you, Mr. Nissen, that I should advise him?" [R.T. p. 5240, lines 5-15.]

Thereafter, the following proceedings took place in the presence of the jury:

> "By Mr. Nissen:
>
> Q. Mr. Snyder, this is a chart we have marked 2-A in evidence, showing the top floor of a portion

of the Friars Club and some red marks on the roof, sir. If you need to you can step down to look at it. If you can see it from there you may remain seated.

A. I can see it.

Q. I ask you, sir, during the period 1964 through 1967, sir, did you ever operate peekholes in the Friars Club on the top floor indicated approximately where the small red dots are located on Exhibit 2-A?

A. I refuse to answer on the ground it may tend to incriminate me.

The Court: Well, Mr. Snyder, for the reasons that I have indicated before, the court must find that refusal is no longer valid because, as I said before, your answer cannot tend to incriminate you in view of the immunity given to you by the court. Accordingly, the court will instruct you to answer the question.

The Witness: May I speak to my lawyer?

Mr. Sherman: May I approach the witness, your Honor?

Mr. Nissen: Could we take off the mike, your Honor?

The Court: Yes—it has been shut off.

(Mr. Sherman and the witness confer.)

The Court: Would you ask the question again?

By Mr. Nissen:

Q. Your reply to my question, sir? Do you recall the question?

The Court: Do you recall the question.

The Witness: Yes, I do.

The Court: You will answer the question.

The Witness: On the advice of my counsel previously stated, I refuse to answer, respectfully refuse to answer.

Mr. Nissen: Before any sanctions are imposed, your Honor, we would like to be heard at the bench regarding the timing of that.

The Court: With regard to what?

Mr. Nissen: The time the court is going to impose any sanctions on Mr. Snyder? We would like to be heard about it for a second at the bench.

The Court: Do you desire to come to the bench?

Mr. Nissen: Yes.

The Court: Very well." [R.T. p. 5242, lines 13-25; p. 5243, lines 1-25; p. 5244, lines 1-16.]

The court then admonished the jury in the following language:

"Ladies and gentlemen of the jury, you have heard no testimony today with respect to any defendant whatever. There is nothing that you have heard this morning, by the greatest stretch of imagination, that could be used against any defendant. It is just what [sic] simple, isn't it? Remember that many things happen in the course of of a trial that don't pertain to the guilt or innocence of any person, and this is one of them. Act accordingly." [R.T. p. 5250, lines 20-25; p. 5251, lines 1-4.]

Not only does this record demonstrate that these proceedings added critical weight to the prosecutor's case, (*Namet v. United States*, 373 U.S. 179, 10 L. Ed. 278, 83 S. Ct. 1151 (1953), it also establishes a persistent and conscious effort by the prosecutor to force a refusal to

testify after obtaining an order of immunity, knowing the witness would refuse, thus declining to follow the trial court's direct order, all in the presence of the jury. The facts here are not those revealed in *Namet*. *Fletcher v. United States*, 332 F. 2d 724 (D.C. Cir. 1964), clearly points to the differences which make these proceedings obviously prejudicial. Defense counsel here continually objected, and promptly moved for a mistrial, [R.T. pp 5233; 5237; 5240-5241], all to no avail.

The discussion by Judge Hand in *United States v. Maloney*, 262 F. 2d 535 (2nd Cir. 1959) points out areas of critical weight which are present here, *e.g.*, that the admonition to the jury is as likely to prejudice the interest of the accused as to help them; that when a witness claims the privilege "a natural, indeed an almost inevitable inference arises as to what would have been his answer if he had not refused." Another most important consideration is that, as here exists, Petitioner is powerless to dispel "the almost inevitable inference" against him. He is completely deprived of the right of confrontation, to obtain from the mouths of those very witnesses, on cross-examination, that he was in no way involved with their activities. On the contrary, he is poisoned by the testimony from Seach of prior activities of Friedman and Snyder as peek-man, at wholly unrelated times and places. [R.T. pp. 1515-15-17; 2035-2036; 7021; 2038.]

Petitioner likewise is subject to the jury reaching a like inference concerning Gebhard, particularly in view of the charges in the indictment (Counts Seven to Twelve). Again, he is placed in a situation where he is helpless to defend himself. Other than his own sworn statement, and that of Friedman, he is powerless to

compel evidence from other co-defendants, or from Gebhard, that he had no participation in any activities in which they may have testified they were participants. He has been effectively deprived of due process.

(c) *The Allowance of Multitudinous Records of Telephone Calls Into Evidence Without Proper Foundadation Has Permitted Conviction of Crime Based Upon Conjecture.*

Business records, introduced over continuous and repeated objections of counsel [R.T. pp. 901; 3942-3943 are examples] showed telephone numbers listed "to people involved in this case" [R.T. p. 3254], and various calls from number to number. In no instance was any such record connected to a specific call from one identified person to another, or as to what was said between the party calling and the party called. [See, *e.g.*, R.T. p. 3016, 5610; 5616.] We have referred specifically to the numerous exhibits in our Statement of the Case, *supra*.

A chart prepared by the Government [Ex. 58-A] purports to summarize the records of telephone calls showing for each month from June, 1962, to November, 1967, each call made, giving the calling and receiving numbers in each case, but listing them, rather, as a call from and to the persons in whose names the numbers are listed, and, in the case of hotel rooms, in whose name the registration was made. [R.T. pp. 5589-5602; 5604-5631]. Objections to the use of names was overuled. [R.T. pp. 5592-5593.]

Perhaps the admission of the records and the chart would not have constituted prejudical error as to Petitioner had there been proof of some circuumstances relative to his participation. The lower court states,

"The Government concedes that there is no direct proof identifying the caller, the recipient, or what was said." (Opinion, Appendix "A", p. 22.) In an outline of circumstances claimed to justify the admission of these records (Opinion, Appendix "A" p. 24) nothing can be found relating to Petitioner. Not only has Jacobs argued that the proof regarding the telephone calls, the proof of travel, referred to in Counts Seven through Twelve is insufficient under *Osborne v. United States*, 371 F. 2d 913 (9th Cir. 1967) but Petitioner has strenuously argued that such evidence is too vague and speculative to prove guilt of the principals, and consequently cannot avail to prove the crimes against Petitioner. (*United States v. Hoffa*, 349 F. 2d 20 (6th Cir. 1967), aff'd 385 U.S. 293, reh. den. 386 U.S. 940.) *Osborne* clearly holds (p. 928) that records of calls are no proof of their content, "We can pretty well surmise their content *but we cannot convict defendant* of Count 5 *on surmise*." (Emphasis added.) The evidence in *Osborne* was much more complete. At least the parties were identified. Even so, the court stated:

> "We know telephone calls were put through on certain days, but do we know their content? Do we know that the messages transmitted had the purpose of executing a scheme and artifice to defraud, when we cannot find anywhere what was said?" (p. 929).

The holding in *Grimes v. United States*, 379 F. 2d 791 is equally at odds with the ruling of the court below. Cases relied upon by the court below to support the admissibility of the records to prove conspiracy (Opinion, Appendix "A", p. 32, footnote 31) are not well-rea-

soned, and in any event they are no authority for proof of substantive offenses.

The overwhelming proof that the telephone records were permitted to replace competent evidence by mere conjecture and speculation is found in the trial court's comments to the jury, in the closing moments of this long trial. The judge said:

> "And there are many telephone calls from Mr. Jacobs' home to Mr. Gebhard's home and from apparently where Mr. Gebhard stayed in Beverly Hills to Mr. Jacobs' home and to the Friars Club.
>
> "I think I said there were many such telephone calls. I should say that from the evidence you could conclude from the bills and the records of telephone calls, you could conclude that there were these several telephone calls. [R.T. p. 15754, lines 5-31.]
>
> "But none of this proves—none of this directly proves Mr. Jacobs' responsibility. It is up to you to determine, if you conclude that the calls between Mr. Jacobs' telephone number and Mr. Gebhard's telephone number were calls between Mr. Jacobs and Mr. Gebhard, and if you conclude that they had something to do with Gebhard's later being in the ceiling, if you conclude that he was in the ceiling, and that peeking occurred, and that peeking occurred at a time when Mr. Jacobs was playing cards, or that Mr. Gebhard was there for the purpose of facilitating somebody playing cards through a peek operation, and that Mr. Jacobs had something to do with Mr. Gebhard's having been there, then you may find Mr. Jacobs guilty under Count One." [R.T. p. 15754, line 19, to p. 15755, line 8.]

In direct opposition to *Osborne*, the trial court in unmistakable language told the jurors they could *conclude* that calls between Gebhard's and Jacobs' numbers were in fact calls between Jacobs and Gebhard, then they could further *conclude* that the subject of the calls related to cheating at the Friars Club by Gebhard pecking, and they could *conclude* that Jacobs was *at that time* playing cards and that Gebhard *at that time* (whenever it was) was helping him cheat. Even the court below has fallen into the same vice—"There was proof of telephone calls from Jacobs' residence in Los Angeles to Gebhard's residence in Miami, *followed by trips by Gebhard to Los Angeles*, . . ." (Emphasis added) Who proved what trips to Los Angeles? What evidence established that Gebhard, *in response to a telephone call to him*, traveled from Miami to Los Angeles? Is that not the rankest kind of speculation, not countenanced by the court in *Osborne?*

(d) *To Instruct the Jury, Considering the State of the Record, That the Conspiracy Was Presumed to Continue Until the Contrary Was Demonstrated by the Defendant, Imposed an Unjustifiable Burden of Proof Upon Petitioner.*

The proof of the Government affirmatively showed that insofar as Mathes, Seach and Teitelbaum were concerned, the conspiracy in which they participated ended in April or May, 1963 [R.T. pp. 4026-4028; 4037; 4159-4161; 4269; 4483-4485; 4541.] When the only two witnesses that implicated Teitelbaum, testified they ceased to participate further, and one, Mathes, positively testified Teitelbaum likewise participated no longer, what stronger proof could Petitioner offer? To say he was required to overcome a presumption of a

continuing conspiracy to the point of *demonstration* imposes upon him a harsher burden than proof beyond a reasonable doubt. "Demonstrate" is defined in Black's Law Dictionary (4th Ed.) to mean: "to derive from admitted premises by steps of reasoning which admit of no doubt; to prove indubitably." While ordinarily, the burden of establishing withdrawal rests upon the defendant, and mere cessation of activity in furtherance of the conspiracy is not sufficient to carry this burden, where there is uncontradicaed, affirmative evidence of abandonment of the illegal enterprise" "in a manner reasonably calculated to reach co-conspirators" the burden has been met (*United States v. Goldberg*, 401 F. 2d 644, 648-649 (2nd Cir. 1968)).

Conclusion.

For the reasons stated, a Writ of Certiorari directed to the Court of Appeals, Ninth Circuit, should be issued, to the end that its judgment affirming the Judgment of the District Court be reviewed, and that it be reversed to correct the errors complained of, and that Petitioner be accorded a trial affording him due process under the Fifth Amendment.

Respectfully submitted,

CLARENCE S. HUNT,

Attorney for Petitioner Benjamin Teitelbaum.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOHN ROSELLI, *Defendant-Appellant.*	No. 24,220
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MAURICE FRIEDMAN, *Defendant-Appellant.*	No. 24,289
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. BENJAMIN TEITELBAUM, *Defendant-Appellant.*	No. 24,290
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MANUEL JACOBS, *Defendant-Appellant.*	No. 24,300

[September 28, 1970]

Appeal from the United States District Court
for the Central District of California

Before: BROWNING, DUNIWAY and HUFSTEDLER, Circuit Judges.

BROWNING, Circuit Judge:

Appellants participated in an organized scheme to cheat for profit in card games played at the Friars Club, a private social club in Beverly Hills, California. Victims were induced to join high stake gin rummy games. Observers stationed at ceiling peekholes transmitted playing instructions to confederates in the game via electronic signaling devices.

The activity continued from the summer of 1962 to the summer of 1966. Games were "peeked" almost daily during a portion of this period. Appellants and other participants in the scheme made large profits. George Seach, an unindicted coconspirator who acted as "peekman" from late June 1962 to early April 1963, estimated the "take" during this period at $400,000.

After a long and complex trial appellants were convicted of conspiracy to violate 18 U.S.C. § 1952 (interstate travel and use of interstate facilities in aid of racketeering enterprises) and § 2314 (interstate transportation of fraudulently taken securities), and substantive violations of these sections[1] and of 26 U.S.C. § 7206 (false statements in income tax returns).

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[1] 18 U.S.C. § 1952 provides:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to— "(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

18 U.S.C. § 2314 provides in part:

"Whoever transports in interstate commerce any . . . securities or money, of the value of $5,000 or more, knowing the same to have been . . . taken by fraud; . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

I

Appellants' threshold contention that their conduct did not come within the terms of 18 U.S.C. § 1952, raises two issues regarding the meaning of the statute.

Section 1952 condemns interstate travel or the use of interstate facilities in furtherance of "any unlawful activity," defined as including "any business enterprise involving gambling, liquor on which the federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States." The Government's theory is that appellants' conduct constituted a "business enterprise" within the meaning of the statute because it was a continuous course of conduct pursued for profit; and that it involved "gambling . . . offenses" in violation of California Penal Code section 332.[2]

Appellants' first argument is that section 1952 was intended to reach only forms of gambling which were within the province of organized crime at the time the statute was enacted, numbers, bookmaking, and dice, for example; and that gin rummy does not fall in this category.

It is true that section 1952 was aimed at organized crime.[3] It is also true that Congress intended to strike at those illicit activities which provide organized crime with its profits, particularly gam-

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[2]California Penal Code § 332 provides:

"Every person who by the game of 'three card monte' so called, or any other game, device, sleight of hand, pretensions to fortune telling, trick or other means whatever, by use of cards or other implements or instruments, or while betting on sides or hands of any such play or game, fraudulently obtains from another person money or property of any description, shall be punished as in case of larceny of property of like value."

[3]Section 1952 was one of a package of bills referred to collectively in the Senate as the Attorney General's Program to Curb Organized Crime and Racketeering (Hearings before Committee on Judiciary, U.S. Senate, 87th Cong., 1st Sess., on S. 1653-1658, S. 1665); and in the House as Legislation Relating to Organized Crime (Hearings before Committee on Judiciary of H. of Rep., 87th Cong., 1st Sess., on H.R. 468, H.R. 3021-3023, H.R. 3246, H.R. 5630, H.R. 6571-6572, H.R. 6909, H.R. 7039). The records of both hearings contain repeated assertions that all of the bills, including S. 1952, were aimed at organized crime.

bling.[4] But to accomplish this purpose, Congress did not choose to direct the prohibitions of section 1952 against only those persons who could be shown to be members of an organized criminal group (this much appellants concede),[5] or against only those kinds of gambling, liquor, narcotics, and prostitution offenses which racketeers were engaged in at the time Congress acted. The words of section 1952 are general; they contain no restriction to particular persons or to particular kinds of gambling, liquor, narcotics, and prostitution offenses.[6]

The reasons seem self-evident. It would usually be difficult, if not impossible, to prove that an individual or business was associated with or controlled by a clandestine criminal organization. It might also be difficult to prove that a particular offense was of the kind commonly engaged in by organized criminals in 1961; and, in any event, such a restriction upon the statute's coverage would provide an easy avenue for evasion through adoption of new forms and techniques of illicit trafficking. Nothing in the legislative history suggests that Congress intended prosecutors and courts to read into the Act such highly restrictive and administratively impractical exclusionary provisions. On the contrary, as we read the legislative record, Congress meant exactly what the language of section 1952 states—it deliberately chose to make the statute applicable generally, and without crippling restrictions, to any person engaged in any kind of illicit business enterprise in one of the four fields of

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[4] Senate Hearings, note 3, at 11; House Hearings at 19.

[5] Appellants recognize that the statute applies to all persons and not only to persons engaged in organized crime. *United States* v. *Barnes*, 383 F.2d 287, 289 n. 2 (6th Cir. 1967). Cf. *United States* v. *Fabrizio*, 385 U.S. 263, 266-267 (1966).

[6] When Congress wished to further restrict the categories of offenses covered by the statute it did so by express language. Thus the statute originally referred to liquor offenses generally as it now does to gambling, narcotics, and prostitution offenses; but because this was considered too broad, language was added expressly limiting the category of liquor offenses to offenses relating to liquor "on which the Federal excise tax has not been paid." S. Rep. No. 644, 87th Cong., 1st Sess., pp. 1-2. Even this language described a general field of illicit activity and did not attempt to enumerate specific offenses within that field.

activity specified in the statute, which experience showed to be those in which organized racketeers commonly engaged.[7]

Appellants contend that the "business enterprise" requirement was included in section 1952 for the very purpose of limiting the statute as they suggest. Concededly the purpose of the "business enterprise" restriction, like that limiting the statute to illicit activity in one of the four fields in which racketeers were commonly engaged, was to focus the statute upon organized crime. But again the technique Congress employed was that of stating the limitation in general terms applicable to organized crime but not confined to it. Thus Congress limited section 1952 to any "business enterprise" because the requirement of a continuous course of conduct for profit would ordinarily include the gambling operations of organized crime;[8] but, as we have said, there is nothing to suggest that Congress intended to go beyond the conditions expressed in the statute and require either that the "business enterprise" be operated by racketeers or that it be of a specific kind in which racketeers very commonly engaged at the time the statute was enacted.

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[7] Appellants rely heavily upon a letter written by Attorney General Robert F. Kennedy to Representative Owen Harris, which states,

> "During the formulation of the proposal we were aware that to prohibit travel in furtherance of any unlawful activity would be a very broad and vague prescription which might not reach the type of activity in which we were interested. The term 'unlawful activity' was therefore defined to limit its application to those crimes which historically have been the *forte of organized crime.*" (Emphasis added.)

However, the Attorney General immediately identified the crimes he had in mind in the same general terms employed in the statute, stating, "These crimes include gambling, liquor, narcotics, and prostitution offenses and extortion or bribery." 107 Cong. Rec. part 12, p. 16342.

[8] See, e.g., Senate Hearings at 67, 102 House Hearings at 24, 26. The Attorney General is quoted in S. Rep. No. 644, page 2, as stating:

> "The target clearly is organized crime. The travel that would be banned is travel 'in furtherance of a business enterprise' which involves gambling, liquor, narcotics, and prostitution offenses or extortions or bribery. Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise. . . ."

In the letter quoted in note 7, the Attorney General said:

> "The type of offenses which pose such a great threat to this country due to the involvement of organized crime are those offenses which are committed regularly and as a continuous course of conduct. The term 'business enterprise involving' those offenses was used in the definition

Appellants rely heavily upon "interpretive technique" applied to the Anti-Racketeering Act of 1934 (18 U.S.C. § 420(a)) in *United States* v. *Local 807*, 315 U.S. 521, 535 (1942). But precedent is of limited value in determining the meaning of another statute, differently phrased, and having its own unique legislative history. Moreover, the Court's efforts in *Local 807* to discern Congress' intent were not notably successful. *See United States* v. *Green*, 350 U.S. 415, 419 (1956).

Appellants' second argument against coverage is that section 1952 applies only to gambling which is illegal under state (or federal) law; and that California Penal Code section 332 does not make it illegal to play gin rummy for money, but only makes it illegal to commit fraud while playing gin rummy for money.[7]

Again, the statutory language does not support appellants' argu-

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of 'unlawful activity' to connote a continuous course of conduct in gambling etc. It was not the intent to include within the reach of the statute legitimate business enterprises which may touch upon offenses such as gambling."

At the House hearings, Herbert J. Miller, Criminal Division of the Department of Justice, testified:

> "The use of the term 'business enterprise' limits the application of this section to a continuous and organized course of conduct in these activities, and therefore, excludes casual or occasional travel which is not directly related to such a 'business enterprise.'"

In summarizing the bill on the floor, Senator Eastland stated simply, "The use of the term 'business enterprise' requires that the activity be a continuous course of conduct." 107 Cong. Rec. part 10, p. 13943. To the same effect see H.R. Rep. No. 966, 2 U.S. Code Cong. & Admin. News, 87th Cong., 1st Sess., 1961, p. 2666.

See United States v. *Brennan*, 394 F.2d 151, 153 (2d Cir. 1968). *See also Rewis* v. *United States*, 418 F.2d 1238 (5th Cir. 1969), where the court reversed the convictions of two defendants who did nothing more than cross a state line to place bets but affirmed the convictions of those who operated the gaming establishment.

Poker was the game involved in *United States* v. *South*, 389 F.2d 252 (5th Cir. 1968), and bingo in *Dillon* v. *United States*, 391 F.2d 433 (10th Cir. 1968). Neither is the kind of game traditionally associated with organized crime.

[7] California Penal Code section 330 prohibits the playing for money of certain listed card games, "or any banking or percentage game played with cards, dice, or any device." Gin rummy is not among the games listed, and does not fall within the quoted description.

ment. Section 1952 speaks not of illegal gambling, but of a more inclusive category: "gambling . . . offenses."[9]

Although Congress did not record the reason for this choice of language, it seems apparent. It is not illegal per se to engage in any of the four fields of activity listed in section 1952 under the laws either of the United States or of all fifty states. The statutory approach in these areas has often been regulatory rather than flatly prohibitory — particular conduct is forbidden, or conduct in particular circumstances or by particular persons.[10] If section 1952 applied only when all business activity was absolutely prohibited in the particular field, the reach of the section would be materially diminished without apparent reason in terms of the statute's purpose. There is no evidence that Congress intended this result.[11]

Appellants point to the fact that Congress declined to adopt a suggestion that section 1952 be broadened to include interstate travel and use of interstate facilities in furtherance of criminal fraud.[12] They argue that California Penal Code section 332 simply punishes fraud, and therefore the term "gambling . . . offenses" should not be construed to include violations of section 332.

As originally enacted, the California statute dealt exclusively with cheating while gambling. By a series of amendments its scope

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[9]In *Turf Center, Inc.* v. *United States*, 335 F.2d 772, 775 (9th Cir. 1964), we held that "offenses" applies to "gambling" as well as to the other three types of conduct specified in section 1952.

That "gambling . . . offenses" is a broader term than "gambling," see *United States* v. *Berglund*, 318 F.2d 159, 161 (7th Cir. 1963).

[10]No documentation is necessary as to the first three fields of activity. As to the fourth, see Nev. Rev. Stats. 201.300-.440, which regulate but do not prohibit prostitution. *Raymond* v. *United States*, 355 F.2d 281 (9th Cir. 1967).

[11]Appellants call attention to occasional references to "illegal gambling" in the legislative proceedings. In context these references do not appear to us to be significant.

[12]Senate Hearings at 113. *See also* 107 Cong. Rec. part 10, p. 13802.

was broadened to include fraud in certain other specified contexts."[9] It is not, however, a general fraud statute. It prohibits cheating only in the stipulated contexts, including gambling. It is expressly directed (among other things) at the regulation of gambling conduct. It expressly prohibits (among other things) fraud while gambling. We see no reason for excluding violations of this particular prohibition of section 332 from the category of "gambling . . . offenses."

Appellants call attention to exchanges at committee hearings and in floor debates which indicate that section 1952 is to apply only to illegal business enterprises, and not to illegal conduct incidental to lawful business enterprises.[10] If we understand correctly, the

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[9]The text of the prior statute is printed as an historical note following Cal. Penal Code § 332 in West's Annotated California Codes.

[10]107 Cong. Rec. parts 12, 14, pp. 16341-16342, 18815; House Hearings, pp. 335, 336, 339.

The following excerpts from the House Hearings are illustrative:

"[339] Mr. FOLEY [committee counsel]. At that point, may I interrupt you to clarify this.

"Would you say that as a condition precedent, for any violation of this statute, the individual concerned must be engaged in a business enterprise which is illegal in these four categories that you are talking about?

"Mr. MILLER [Assistant Attorney General, Department of Justice]. Absolutely.

"Mr. FOLEY. In other words, it cannot be a legitimate business with an incidental violation resulting from the interstate travel?

"He must first be engaged in the unlawful activity, as a business man?

"Mr. MILLER. That is exactly the concept we tried to embody in this bill, Mr. Foley. That is why I go back to the definition of business enterprise, in order to—"

* * * *

"[339] Mr. MILLER. Mr. Chairman, in order for us to bring any prosecutive action under this statute, the first thing we are going to have to prove is that there was a business that was unlawful under the laws of the State and that business involved the specified violations here."

* * * *

"[341] Mr. MILLER. . . . [T]his brings up the whole basic concept of this bill, that there is an organized course of conduct within the confines of a State which is unlawful. That is a condition precedent."

* * * *

"[341] Mr. TOLL. May I follow up the answer, Mr. Miller, that you gave to Mr. Foley and to Congressman Rogers, with an illustration of a fellow that conducts a tavern in Pennsylvania, where the sale of liquor is legal; he goes to New Jersey, buys his liquor by the case, brings it to his tavern in Philadelphia, does not put the stamps on.

conclusion we are asked to draw is that illegal cheating incidental to lawful gambling is not within section 1952.

Accepting the premise, the conclusion does not follow. This case does not involve cheating incidental to a lawful gambling enterprise. There was no business enterprise involved, lawful or otherwise, absent the cheating. In conception, organization, and execution, appellants' business enterprise was that of cheating at gin rummy for profit; and such a business enterprise was illegal under California Penal Code section 332. There was nothing incidental about the unlawful aspect of appellants' business.

We conclude that appellants' conduct fell within section 1952.

II

Each appellant challenges the sufficiency of the evidence.

A few additional background facts are necessary to an understanding of the issues raised.

Count 1 of the indictment charged a conspiracy to violate 18 U.S.C. §§ 1952 and 2314; Counts 2 through 12 charged substantive violations of section 1952; Counts 13 through 19 charged substantive violations of section 2314. Counts 20 and 21 were dismissed. Counts 22 through 24 charged violations of 26 U.S.C. § 7206(1). The section 1952 charges required proof that appellants used interstate facilities and traveled in interstate commerce to promote the unlawful gambling enterprise; the section 2314 charges required proof that appellants transported in interstate commerce securities that they knew had been taken by fraud. *See* note 1.

The general theory of the Government's case was as follows:

"That would not be a violation under this law, would it?"

"[2d] Mr. MILLER. I think there has been a misconception of this statute in this regard. When we defined business enterprise as one involving gambling, liquor violation, and the like, we were thinking of the business itself as being an illegal business. Any business enterprise can have an employee or the president or someone down the line commit some act which is a violation of a statute and therefore, a crime. I mean, he might be selling dice in the bathroom for example, which is a violation of the State law.

"Now, that does not make the business enterprise, itself, an unlawful one. It merely means that one individual has committed a crime, and it has no relation to the business enterprise itself. So I do not foresee that the factual situation you outlined would come within the purview of this bill."

Friedman, the prime mover in the scheme, lived in Las Vegas, Nevada, as did George Search, who "peeked" the earlier games. Edwin Gebhard, who replaced Search as "peekman," lived in Miami, Florida. When a rigged game was planned, Friedman telephoned Search in Las Vegas and asked him to come to Beverly Hills. Search then traveled to Beverly Hills and "peeked" the game. When Search went to prison and was no longer available, appellant Jacobs telephoned Gebhard in Miami, and Gebhard traveled to Beverly Hills for the same purpose. Friedman carried checks obtained from victims in payment of losses in the "peeked" games back to Las Vegas and deposited them in his Las Vegas bank account.

Counts 2 through 5 of the section 1952 substantive counts are based on two Friedman-Search telephone calls and two subsequent Search trips from Las Vegas to Beverly Hills; Count 6 is based on travel by Friedman and appellant Roselli from Los Angeles to Las Vegas to distribute the proceeds of a "peeked" game; Counts 7 through 12 are based on three Jacobs-Gebhard telephone calls and Three subsequent Gebhard trips between Miami and Beverly Hills. The seven section 2314 counts (Counts 13 through 19) are based on the transportation of eight checks to Las Vegas from Los Angeles County, or, in the process of collection through banking channels[*] from Las Vegas to Los Angeles County, or from Los Angeles County to Chicago via Las Vegas.

With this background we turn to the contentions of each appellant.

Friedman. Friedman restates, in terms of insufficiency of evidence to prove the conspiracy, the argument that the conspiracy did not violate section 1952 because the kind of gambling disclosed by the evidence (gambling at gin rummy) was lawful in California.

He also argues that the proof failed to establish the knowledge required to make out a substantive violation of section 2314 — namely, knowledge that the securities transported were obtained by fraud — and hence failed to establish the knowledge required to convict him of conspiracy to violate that section. We agree, of course, that conviction of conspiracy to commit the substantive offense

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[*]The act of depositing a check drawn on an out of state bank satisfies the requirement that the accused cause the security to be transported in interstate commerce. *Pereira* v. *United States*, *supra*; *United States* v. *Sheridan*, 329 U.S. 379, 381 (1946).

required proof of the knowledge essential to conviction of the substantive offense itself, for "[i]f this minimum intent is not present, no offense is contemplated" by the alleged conspirators. Developments in the Law - Criminal Conspiracy, 72 HARV. L. REV. 920, 939 n. 101 (1959). *See Ingram* v. *United States*, 360 U.S. 672, 678 (1959); *United States* v. *Chase*, 372 F.2d 453, 460 (4th Cir. 1967); *Hernandez* v. *United States*, 300 F.2d 114, 120 (1962); *United States* v. *Gardner*, 171 F.2d 753, 754 (7th Cir. 1948). On the other hand, no greater or different intent is required. See text at note 17. We therefore consider the question of the sufficiency of the evidence to prove knowledge in our discussion of the evidence supporting the substantive counts.

Friedman challenges the sufficiency of proof of the section 2314 substantive counts. The sentences on these counts were concurrent with those imposed on the section 1952 substantive counts except that a fine in addition to imprisonment was imposed on Counts 13, 15, and 19. We confine our attention to these three counts.

Counts 13 and 15 charged Friedman with transporting specifically described checks in interstate commerce from Los Angeles County to Las Vegas, knowing them to have been taken by fraud. Count 19 charged transportation of a check from Los Angeles County to Chicago via Las Vegas. Friedman argues that the evidence failed to establish that he knew the checks were obtained by fraud or that he transported the checks or caused them to be transported. He concedes that the checks represented winnings from Friars Club card games; his argument is really that the particular checks were not shown to have been taken by fraud because the Government did not demonstrate that they represented winnings from dishonest rather than from one of the concededly many honest games. Similarly, he contends that proof of transportation of the checks is insufficient because, although the checks were deposited in Friedman's Las Vegas account, the Government did not demonstrate that he or his agent, rather than some other person, brought the checks from Los Angeles County.

Much of Friedman's argument rests upon assumptions as to the standard governing review of the sufficiency of circumstantial evidence that we rejected in *United States* v. *Nelson*, 419 F.2d 1237 (9th Cir. 1969). Our inquiry is simply whether on the evidence the jurors "could reasonably decide that they would not hesitate to

act in their own serious affairs upon factual assumptions as probable as the conclusion" that the particular checks were won in "packed" games and that Friedman transported them, or caused them to be transported from Los Angeles County to Las Vegas. *Id.* at 1245.

The evidence that the check involved in Count 13 originated in a "packed" game was as follows.

As noted earlier, the evidence established a repeated pattern of Friedman's use of interstate telephone facilities to summon Seach, interstate travel by Seach, a "packed" game, and receipt and distribution of winnings, usually by check. Telephone records showed a long distance call from Friedman in Los Angeles County to Seach in Las Vegas on February 18; money order records established Seach's presence in Los Angeles County on February 21; and Friedman testified that the check involved in Count 13 represented winnings in a game played in Beverly Hills February 20, 1963.

It is possible, on this record, that the February 20 game was honest, as Friedman argues; but the overwhelming probabilities are that it was not. On the evidence the jury could resolve the issue against Friedman "free of 'the kind of doubt that would make a person hesitate to act' in the more serious and important affairs of his own life." *Nelson, supra* at 1243.

The jury could also have found that Friedman transported the check involved in Count 13 from Los Angeles County to Las Vegas. Friedman admitted that the particular check was given to him in Los Angeles on February 21; records that he introduced showed that he traveled from Los Angeles to Las Vegas on February 22; and bank records and his own testimony established that the check was deposited in his account in Las Vegas on February 25.

The evidence supporting Count 15 is similar in character and at least as strong.

This is not true, however, of the evidence relating to Count 19. The crucial difference is that there was no proof connecting the checks referred to in Count 19 with a particular game. Since many of the games were not "packed," the jury's determination that these checks were taken by fraud is without evidentiary support. Friedman's conviction on this count will be reversed.

Teitelbaum. Teitelbaum argues that the evidence was insufficient to support his conviction of conspiracy to violate sections 1952 and

2314 because it failed to establish that he agreed to the use of the interstate facilities and to the interstate travel and transportation, which are essential elements of the substantive offenses. We reject the argument on alternate grounds. First, the knowing use of interstate facilities is not an essential element of either the substantive offenses or the conspiracy to commit them; and, second, if it were, the evidence was sufficient to establish that Teitelbaum acted with the requisite knowledge.

The words of sections 1952 and 2314 do not suggest that Congress intended to condition liability upon knowing use of interstate facilities; their natural import is to the contrary. In both sections the requisite mental state is identified, and in neither does it include knowledge of the interstate element of the offense. *See* note 1; *United States* v. *Bash*, 258 F.Supp. 807, 809-813 (N.D.Ind. 1966), *aff'd sub nom. United States* v. *Miller*, 379 F.2d 483 (7th Cir. 1967). *Compare* 18 U.S.C. §§ 1084, 1958, 2421.

We have found nothing in the legislative history that indicates a purpose to limit sections 1952 and 2314 to violators who specifically intend to utilize interstate facilities. It is quite clear that in enacting section 1952 Congress was not concerned with regulating interstate travel or the use of interstate facilities, but rather with directly suppressing unlawful local activities from which organized crime drew its sustenance. Similarly, section 2314 is aimed at the evils of theft, fraud, and counterfeiting and not at the regulation of interstate transportation. Suppression of movement of the fruits of theft and fraud is only the means to the end of suppressing theft and fraud themselves. The sole reason for conditioning the statutes' prohibitions upon use of interstate commerce is to provide a constitutional basis for the exercise of federal power.

As the Second Circuit recently pointed out in discussing the same issue in connection with 18 U.S.C. § 1343, the purpose of statutes of this kind argues against a construction making a specific "anti-federal" intent an element of the offense:

> "The statute does not condition guilt upon knowledge that interstate communication is used. The use of interstate communication is logically no part of the crime itself. It is included in the statute merely as a ground for federal jurisdiction. The essence of the crime is the fraudulent scheme itself.

> Nothing is added to the guilt of the violator of the statute by reason of his having used an interstate telephone to further his scheme. There is consequently no reason at all why guilt under the statute should hinge upon knowledge that interstate communication is used. If the wire employed is an interstate wire the requirements for federal jurisdiction are satisfied. It is wholly irrelevant to any purpose of the statute that the perpetrator of the fraud knows about the use of interstate communication." *United States* v. *Blassingame*, F.2d (2d Cir. June 1, 1970).[11]

Accordingly, knowing interstate travel or knowing use of an interstate facility is not an essential element of a violation of section 1952; *see United States* v. *Miller*, *supra*, 379 F.2d at 487; *cf. Spinelli* v. *United States*, 382 F.2d 871, 893 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969); *United States* v. *Chase*, 372 F.2d 453, 460 (4th Cir. 1967), and knowing interstate transportation is not an essential element of a violation of section 2314, *see United States* v. *Kierschke*, 315 F.2d 315, 318 (6th Cir. 1963); *cf. Hulsey* v. *United States*, 369 F.2d 284, 287 (8th Cir. 1966); *Pritchard* v. *United States*, 386 F.2d 760, 764 (8th Cir. 1967).

There is therefore no rational basis for holding that such knowledge is an essential element of a conspiracy to commit the offenses created by the substantive sections. The essence of the offense under the general conspiracy statute, 18 U.S.C. § 371, is an agreement by two or more persons to commit the substantive crime. In virtually all cases the meeting of minds is established simply by inference from a concert of action that produces the forbidden re-

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[11] Similarly, in construing 18 U.S.C. § 641 as not requiring proof that the stolen property belonged to the United States, Judge Hufstedler said in *United States* v. *Howey*, F.2d (9th Cir. June 5, 1970):

> "The reason for including the requirement that the property, in fact, belongs to the Government was to state the foundation for federal jurisdiction. A defendant's knowledge of the jurisdictional fact is irrelevant, as we have held in many cases interpreting analogous statutory provisions. (*E.g.*, *United States* v. *Kartman* (9th Cir. 1969) 417 F.2d 883; *McEwen* v. *United States*, (9th Cir. 1968) 390 F.2d 47. *See also United States* v. *Bolin* (9th Cir. 1970) 423 F.2d 834.)"

See also Baker v. *United States*, F.2d (9th Cir. July 17, 1970).

Illustrative cases interpreting analogous statutes as not requiring knowledge of the federal jurisdictional fact are collected in Judge Carter's opinion in *United States* v. *Bolin*, 423 F.2d 834, 836–837 (9th Cir. 1970).

sult. There is no apparent reason for requiring not only proof of a concert of action that includes all elements of the substantive offense, but also proof of knowledge of the jurisdictional element that is not required for conviction of the substantive offense. Such knowledge is as irrelevant to the purposes of the general conspiracy statute[18] as it is to the purposes of the substantive statutes. *See* Developments in the Law—Criminal Conspiracy, 72 HAR. L. REV. 920, 938-939 (1959).[19]

Teitelbaum's argument is that conspiracy to commit a federal substantive offense necessarily includes an agreement upon all elements of that offense. We think it sufficient that the agreement contemplates the commission of a crime and that the crime contemplated is in fact and law a federal offense.

It is an element of the offenses created by the first paragraph of section 2314 that the value of the stolen securities exceeds $5,000. It would not be a defense to a charge of the substantive offense that the accused *thought* the securities worth only $2,000, if in fact their value exceeded the statutory minimum.[20] Can it be that a lack of knowledge of this jurisdictional element would

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[18]The reasons for condemning conspiracies were stated in *United States* v. *Rabinowich*, 238 U.S. 78, 88 (1915):

> "For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the more commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered."

These evils of conspiracy are present whether or not the conspirators are aware of the jurisdictional aspects of their crime.

[19]Several opinions have assumed the need for such proof, but apparently without consideration of the problem. *See, e.g., Pereira* v. *United States*, 347 U.S. 1, 12-13 (1954) (conspiracy to violate § 2314); *United States* v. *Edwards*, 366 F.2d 853, 869 (2d Cir. 1966) (same); *United States* v. *Fellabaum*, 408 F.2d 220, 223-224 (7th Cir. 1969) (conspiracy to violate § 1952); *United States* v. *Barnes*, 383 F.2d 287 (6th Cir. 1967) (same).

[20]The value of property taken by fraud is determined by the market value at the time and place of taking, *Cave* v. *United States*, 390 F.2d 58, 67 (8th Cir. 1968).

nonetheless afford a defense to a charge of conspiracy to violate section 2314?

It may be argued that because a conspiracy to commit a substantive offense may exist without actual commission of the substantive offense, conspiracies to commit state crimes might be charged under the federal conspiracy laws if there were no need to prove agreement about the aspects of the crime that confer federal jurisdiction. The simple answer is that absent the presence of the jurisdictional element, no charge can be made. The point is not that the jurisdictional element need not exist, but merely that there need be no proof that the defendants were aware of its existence.

In the second place, as we have said, Teitelbaum's conviction of conspiracy was proper even if knowledge of the interstate aspects of the illegal scheme is an essential element of the offense.

In *Twitchell* v. *United States*, 313 F.2d 425 (9th Cir. 1962), we construed the Mann Act, 18 U.S.C. §§ 2421-2422, as requiring knowledge of the illegal transportation of females in interstate commerce for immoral purposes.[21] We held, however, that possession of the requisite knowledge by one charged with conspiracy to violate the Act could be established by circumstantial proof that he agreed to a scheme "in which it was known that the likelihood of illegal interstate transportation was great." (429)

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[21]Our construction of the Mann Act in Twitchell is not inconsistent with the interpretation we have given to sections 1951 and 2313.

The words of the Mann Act ("Whoever knowingly transports in interstate or foreign commerce," etc.) strongly suggest that knowledge of the interstate transportation is an element of the offense.

Moreover, the Act's legislative history establishes that Congress' purpose was not to control local immorality but rather to deny the use of interstate facilities to a traffic viewed as evil.

Opposition to the bill that became the Mann Act was based largely on the thesis that, although cast in the form of a regulation of interstate commerce, the statute was in reality an attempt to regulate prostitution and other immoral practices exclusively within the states' police power. *See, for example,* H. R. Rep. No. 47, 61st Cong., 2d Sess., Part 2, Views of the Minority, particularly page 1, and discussion at 45 Cong. Record 8[illegible]9-811, 1030-1035. Proponents of the bill repeatedly assured Congress that the statute's intent was to deal solely with the evil of transportation of women and girls in interstate and foreign commerce for immoral purposes. Thus, the Report of

At Teitelbaum's request, the jury was instructed in accordance with the *Twitchell* formulation.[22] in a manner that completely satisfied his definition of the elements of the present offenses; and we are satisfied that the evidence was sufficient to justify the jury's conclusion that the proof of his guilt met the *Twitchell* standard.

There was direct testimony by Seach that Teitelbaum joined the conspiracy in September 1962, and participated actively in it until at least April 1963. He set up at least one rigged game, played in such games, received signals from the hidden "peekman," and shared in the spoils. As we have noted, the evidence also established, as an integral part of the scheme, a pattern of interstate phone

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the House Committee on Interstate and Foreign Commerce denies any purpose to interfere with state control of local immorality, insists repeatedly that the evil at which the statute is directed is the movement of women and girls in commerce—the importation of women and girls and their transportation from one state to another—and points out that the Act's prohibitions "have been so drawn that they are limited to cases in which there is an act of transportation in interstate commerce of women for purposes of prostitution." H. R. Rep. No. 47, 61st Cong., 2d Sess., pp. 1, 2, 3, 4, 5, 9, 10, 11. Identical statements appear in the Senate Report. S. Rep. No. 885, 61st Cong., 2d Sess., pp. 7, 8, 9, 10, 11. Although the bill was not debated in the Senate, the same theme ran through the debate in the House, the bill's proponents repeatedly asserting that the statute's prohibitions were aimed solely at the transportation of persons in commerce. *See* particularly the discussion of Congressmen Russell, Peters, and Sanders, who carried the burden of the legal argument for the proponents, at 45 Cong. Record 814–821, 1035–1040.

[22] The full formulation in *Twitchell* is as follows:

"We think that, in a case of this kind, the evidence must show in relation to Twitchell that either:

"1. he directly agreed to the illegal interstate transportation, or directly agreed to a scheme which could not be consummated without illegal interstate transportation, or directly agreed to a scheme in which it was known that the likelihood of illegal interstate transportation was great (it being understood that such agreement need not be overt, and may be inferred from circumstantial evidence; and that directness refers not to face-to-face dealings, but to the extent of his knowledge of the purpose and scope of the conspiracy); or

"2. he evidenced his indirect agreement by substantial participation in the scheme with actual knowledge of the proposed, or completed, illegal interstate transportation." 313 F.2d at 429.

calls, interstate travel, and interstate transportation.[23] The jury was entirely warranted in concluding, as we do, that it is inconceivable that one so intimately connected with the conspiracy over so long a period could have been unaware of these interstate activities. *See Pereira* v. *United States*, 347 U.S. 1, 12-13 (1954); *United States* v. *Corallo*, 413 F.2d 1306, 1326-1327 (2d Cir. 1969); *Grimes* v. *United States*, 379 F.2d 791, 795-796 (5th Cir. 1967); *Nassif* v. *United States*, 370 F.2d 147, 152-153 (8th Cir. 1966).

Teitelbaum also challenges the sufficiency of the evidence to sustain his conviction on the various counts charging substantive violations of sections 1952 and 2314. The jury was instructed, in accordance with the holding in *Pinkerton* v. *United States*, 328 U.S. 640, 647 (1946), that each defendant could be found guilty of the substantive offenses with which he was charged if the evidence established that he had joined the conspiracy and that the substantive offenses were committed in furtherance of it.[24] Teitelbaum does not argue that the evidence was insufficient to establish the conspiracy or his participation in it, nor does he argue that the substantive offenses were not committed pursuant to that conspiracy.

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[23] Teitelbaum points out that Seach had taken an apartment in Beverly Hills by the time Teitelbaum joined the conspiracy. The evidence showed, however, that while Seach spent the week days in his apartment behind the Friars Club during the period of heaviest play, he returned to Nevada for the weekends; when play slackened, Seach remained in Las Vegas, returning to Los Angeles County only when called by Friedman or Mathes to "peek" a game. Also, Friedman made frequent trips between Nevada and California during this period.

[24] The instruction read:

> "With respect to all of the substantive offenses charged in Counts Two through Nineteen of the indictment, if you are satisfied from the evidence beyond a reasonable doubt that at the time these substantive offenses were committed, if they were committed, the defendants named in each of the substantive counts were members of an unlawful conspiracy, as I have heretofore defined unlawful conspiracy to you, then you may find the defendants guilty on all of the substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy, which you have found from the evidence existed."

Of course, *Pinkerton* applies only when the intent required for conviction of the conspiracy encompasses the intent required for conviction of the substantive offenses (*Hernandez* v. *United States*, 300 F.2d 114, 121, n. 17 (9th Cir. 1952)); and, as we have seen, this condition is satisfied in the present case.

Nonetheless, he advances two reasons why his convictions under the substantive counts should not be affirmed on the *Pinkerton* theory.

First, he contends, and urged the trial court to instruct the jury, that he could be convicted under Counts 2 through 12 on the *Pinkerton* theory only if the jury found that he had "actual personal knowledge" of the particular interstate telephone call and of the particular interstate travel alleged in a specific count. He asserts that evidence of such knowledge was lacking. But *Pinkerton* rests upon the general principle of conspiracy law that each conspirator is responsible for the acts of the others pursuant to and in furtherance of the conspiracy (328 U.S. at 646-647), and it is well settled that "he is liable for the acts of his co-conspirators though he was not aware of the performance of those acts, nor even of the existence of the actors." *Hernandez* v. *United States*, *supra*, 300 F. 2d at 122.[25]

Teitelbaum's second argument arises because Counts 2 through 12 of the indictment alleged that he aided and abetted the commission of the offenses charged; yet the trial court instructed the jury that as to all but one of these counts, Teitelbaum could not be convicted as an aider and abettor, but could only be convicted under the *Pinkerton* theory because there was no evidence that he was personally aware of the interstate telephone calls and interstate trips specified in these counts. Teitelbaum contends that because the indictment alleged that he aided and abetted the commission of the substantive offenses, the court's instruction that he could be convicted of the substantive offenses under the *Pinkerton*

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[25] The only support for Teitelbaum's contention is found in dictum in *United States* v. *Barrow*, 229 F.Supp. 722, 733-734 (E.D. Pa. 1964), *rev'd in part on other grounds*, 363 F.2d 62 (3rd Cir. 1966). The *Barrow* court did not consider the rationale upon which we rest our contrary conclusion.

The ruling in *Barrow* related to another problem, whether the jury should be instructed that a conspirator may not be convicted of a substantive offense committed by a co-conspirator if commission of the offense "could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Pinkerton*, 328 U.S. at 648. While this additional language may be added to the instruction if requested, it does not appear in the instruction approved in *Pinkerton*, see 328 U.S. at 645, n. 6, and its omission is not reversible error. *United States* v. *Edwards*, 366 F.2d 853, 889 (2d Cir. 1966).

theory "broadened" the indictment and denied him his Fifth Amendment right to be held to answer only "on a presentment or indictment of a Grand Jury." A conspirator, however, may be convicted on the *Pinkerton* theory without a specific allegation that a coconspirator committed the offense in furtherance of the conspiracy.[26]

Hence, the only possible basis for objection by Teitelbaum is that the wording of the indictment somehow misled him to his prejudice. He appears to complain because the allegation that he aided and abetted the commission of the offenses caused him to come forward with a defense, and a successful one, specifically directed to that theory of liability, but since he would have been exposed to liability on this theory in any event, the particularization did him no harm.[27] He does not suggest, even now, that he failed to present any evidence or argument that he might have presented had the indictment omitted the specific charge of aiding and abetting, or had it spelled out the *Pinkerton* theory of liability. It was clear from the face of the indictment that the conspiracy charge and the substantive charges were based on a single course of conduct by the alleged conspirators, including Teitelbaum. Since he was charged as a conspirator, he was on notice that he must defend against that charge, and he did so, vigorously. Since he was charged as an aider and abettor, he was on notice to establish, if he could, any possible legal or factual defense to the substantive offenses. The remaining element of *Pinkerton* liability—that the substantive offenses, if committed, were acts in furtherance of the conspiracy—was not subject to argument in the context of this case.

Roselli. Roselli's principal contention is that statements by Friedman that implicated Roselli should have been excluded as hearsay

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[26]No such allegation is mentioned in *Pinkerton* or in any of the decisions following it. Of course, the jury must be instructed on the *Pinkerton* theory of liability if a conviction is to be sustained on that theory. *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949); *Thomas v. United States*, 368 F.2d 531, 541 (5th Cir. 1967).

[27]An accused charged with an offense may be convicted on evidence showing that he aided and abetted another in the commission of that offense, even though the indictment does not allege this theory of liability; hence the language of the indictment charging him with aiding and abetting was simply surplusage. *E.g., United States v. Lester*, 363 F.2d 66, 72 (6th Cir. 1966); *Lambert v. United States*, 226 F.2d 602 (5th Cir. 1955).

because there was insufficient evidence independent of the statements to support the trial judge's required preliminary finding that Roselli was engaged in a joint undertaking with the declarants. *Glasser* v. *United States*, 315 U.S. 60, 74 (1942); *Carbo* v. *United States*, 314 F.2d 718, 735-738 (9th Cir. 1963).

We disagree.

Roselli was identified as being present at a number of rigged games, although not as a player.

The proceeds of one "peeked" game included three checks totaling $31,500 given to Teitelbaum by one of the victims. At Teitelbaum's request, the victim subsequently replaced one of the checks with a new one for $10,000 made out to "J. Martinez," a fictitious name. Friedman ultimately gave this same check to his secretary in Las Vegas and instructed her to collect it and give the proceeds to Roselli. She delivered to Roselli an envelope containing $10,000 in cash. He gave her a $100 gratuity in return. Friedman denied that this represented Roselli's share of the proceeds of the rigged game and testified that Roselli was merely acting as a messenger to pay a debt Friedman owed to a third party. The trial court, however, was not required to believe this improbable explanation.

Seach testified that about this time Roselli was present at a meeting between Seach and Friedman. When Seach described a new peeking device he had developed, Friedman suggested that Seach "leave it with us, and we'll put a share of the profits away for you." Seach refused, remarking, "It's hard enough to get your money when you're there, John, isn't it?" Roselli replied, "That's right"; and continued, "From now on I'm going to be there."

This evidence was sufficient to support the trial court's conclusion that a prima facie case involving Roselli in the joint enterprise had been made out. Friedman's statements in furtherance of the common enterprise were therefore admissible against Roselli, and this additional evidence furnished adequate support for the jury's verdict against him under Count 1.[28]

Roselli was also convicted of substantive violations stemming from transportation of the "J. Martinez" check to Las Vegas from

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[28]Both Mathes and Seach testified that Friedman had told them that Roselli knew about the "peek" and had been cut in as a partner.

Los Angeles.[20] There was ample proof, if believed, to convince the jury that Friedman was responsible for transporting the check to Las Vegas in furtherance of the conspiracy, and thus to justify Rosselli's conviction of the substantive counts as Friedman's co-conspirator.

Finally, Rosselli was convicted under Count 22 of willfully filing a false income tax return. The jury, as well as the judge, could have rejected Friedman's testimony and concluded that the $10,000 Rosselli received in Las Vegas was not Friedman's money but Rosselli's, and it is undisputed that Rosselli failed to declare it as income.

Jacobs. Appellant Jacobs became involved about the time Mathes and Search, the two Government witnesses who participated in the scheme, were leaving. Most of the evidence relating to Jacobs' participation is therefore circumstantial and considerably less detailed than that relating to the other appellants, but we are entirely satisfied that it was sufficient to support the verdict.

Two problems merit discussion.

The Government introduced telephone records reflecting calls on particular dates between phones in Jacobs' residence in Los Angeles, California, and Gebhard's residence in Miami, Florida, to prove the three Jacobs-Gebhard telephone calls underlying Counts 7, 9, and 11.[21] The Government concedes that there is no direct proof identifying the caller, the recipient, or what was said. Jacobs argues that for this reason the evidence was insufficient, citing *Osborne* v. *United States*, 371 F.2d 913 (9th Cir. 1967).[22]

Osborne does not hold that the parties and subject matter must be established by direct evidence, but only that the proof of those facts, direct or circumstantial, must be sufficient. To avoid repetition, we defer summarizing the relevant circumstantial evidence in

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[20] Counts 6, 16, 17, and 18 were all based upon the interstate transportation of the "Martinez" check.

[21] Gebhard's subsequent trips to Los Angeles formed the basis of Counts 8, 10, and 12.

[22] Friedman's related argument that the telephone records were not admissible as evidence of conspiracy without foundation proof identifying the parties and subject matter is without merit. *United States* v. *Novick*, 124 F.2d 107, 110 (2d Cir. 1941); *United States* v. *Gallo*, 123 F.2d 229, 231 (2d Cir. 1941).

this case to our later discussion of the problem of variance. That evidence was sufficient, in our opinion, to permit the jury to conclude that the calls were made by Jacobs and received by Gebhard, that their substance was a summons to Gebhard to "peak" games at the Friars Club, and that Gebhard then came to Los Angeles for this purpose.

The second problem relates to the charge in Count 24 that Jacobs willfully filed a false income tax return that did not report income "in excess of $20,000" won from card-playing activities at the Friars Club. The Government's evidence showed payments of $24,750 to Jacobs by a single loser in the year in question. Jacobs did declare $17,000 in income from "sporting enterprises," and the jury was instructed that "sporting enterprises" was an acceptable term for gambling income. Hence, the undisclosed balance established by the evidence was $7,750 rather than "in excess of $20,000" as alleged. Jacobs argues that the Government was bound by its allegation. It is enough that the Government establishes that substantial income went unreported. *United States* v. *Johnson*, 319 U.S. 503, 517-518 (1943).

III

Appellants Roselli and Jacobs argue that the Government alleged one conspiracy but proved at least two and that this variance requires reversal under *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

Roselli rests his argument upon the assertion that the Government's evidence connected him with only one of the many rigged games. His evaluation of the record is not accurate, but even if it were, that he participated in only one of the series of rigged games would not establish that the particular game reflected a separate conspiracy rather than one incident in a continuing conspiracy encompassing the series of games. The only difference between the game to which Roselli refers and the games preceding and following it is that this game marked the point at which Roselli began to share in the proceeds. The same conspirators cheated in the same way before that game and after. In *Kotteakos*, there were in fact separate conspiracies operating independently of each other, though involving a common person.

Jacobs' contention is somewhat different. He argues that the Government's proof showed at least two conspiracies separated in time.

He asserts that there was no evidence that the rigged games continued between July of 1963 when Seach was imprisoned and January of 1965 when Gebhard was observed sawing a hole in the roof of the Friars Club, and that the only early conspirator who was connected with the post-1965 period was Friedman.

We believe the evidence was sufficient to permit the jury to conclude that the conspiracy continued after Seach's last game.

Shortly after Seach "peeked" his last game Jacobs wired funds to Gebhard in Miami. Although Seach was gone, the games went on, and the two main victims, Briskin and Karl, continued to lose about eighty percent of the time, the same rate of loss they had experienced while Seach was "peeking" the games. In September of 1963 a new card room was opened on the third floor of the Friars Club. New "peekholes" were installed; Briskin and Karl continued to lose. Two hatches on the roof of the Friars Club provided access to the "peekholes." The first was observed in August of 1964. Gebhard was seen sawing a hole for the second in July of 1965. Physical evidence established that sometime after May of 1965 Gebhard was in the airspace between the roof and the third floor ceiling where the "peekholes" were cut. The pattern of telephone calls, travel, gambling beneath the "peekholes," and distribution of proceeds, which characterized the Seach period, continued after Seach's departure. There was proof of telephone calls from Jacobs' residence in Los Angeles to Gebhard's residence in Miami, followed by trips by Gebhard to Los Angeles, and by the presence of Friedman, Jacobs, and Gebhard in Los Angeles in October and November, 1964, December, 1964 and January, 1965, March and April, 1965, and October and November, 1965. Games were played under the "peekholes" during these periods, and transfers of funds occurred between Jacobs and Friedman (February 1965), Friedman, Jacobs, and Roselli (April 1965), and Friedman and Jacobs (June 1966). Seach testified to admissions by Jacobs and Friedman in July 1966 that indicated that sometime earlier, after Seach's imprisonment, Gebhard had "peeked" games in which Jacobs and Friedman participated.

Whether there was one conspiracy or two was a question of fact for the jury. *United States* v. *Crosby*, 294 F.2d 928, 945 (2d Cir. 1961). Giving permissible weight to the presumption of continuity

of a once-established conspiracy,[22] the jury could conclude that but a single overall scheme was involved, having unity of purpose and means and a continuity of membership (though the individual participants varied and the periods of their activity overlapped), and that this continuing concert of action, though occasionally quiescent, was never wholly abandoned. There was a marked difference in the detail and directness of the proof relating to the early and later periods, but, as we have noted, this is attributable not to a change in the scheme but to the fact that participants testified as to the early activity in detail, while the evidence relating to later activity was largely circumstantial.

Since the evidence established a single conspiracy it is immaterial, if true, that Jacobs participated only in its later stages.

IV

Appellants Roselli, Teitelbaum, and Jacobs were separately charged, in Counts 22, 23, and 24, with failing to report income received from card-playing activities at the Friars Club. Teitelbaum and Roselli argue that, under Federal Rule of Criminal Procedure 8, the tax counts were improperly joined (1) with each other, and (2) with the other counts of the indictment, and should have been severed. In addition, all three assert error in the denial of their motions under Federal Rule of Criminal Procedure 14 for separate trial on all counts on the ground that a joint trial was prejudicial.

We consider first whether joinder was permissible under Rule 8.

We set aside appellants' argument that joinder was improper because the tax charges were not similar in character to the charges under sections 1952 and 2314. Joinder of charges against multiple defendants is controlled by Rule 8(b), not by Rule 8(a). *Cupo* v. *United States*, 359 F.2d 990, 992 (D.C. Cir. 1966); *King* v. *United States*, 355 F.2d 700, 704 (1st Cir. 1966); *see Williamson* v. *United States*, 310 F.2d 192, 197 (9th Cir. 1962); Wright, Federal Practice and Procedure, Vol. 1, § 144. Under Rule 8(b), the sole basis for joinder of charges against multiple defendants is that the defendants "are alleged to have participated in the same act or trans-

[22] *United States* v. *Perlstein*, 126 F.2d 788, 788 (3d Cir. 1942); *United States* v. *Marino*, 91 F.2d 621, 625 (9th Cir. 1937); *Coates* v. *United States*, 39 F.2d 173, 174 (9th Cir. 1932).

action or in the same series of acts or transactions constituting an offense or offenses." It is irrelevant that Rule 8(a) permits charges "of the same or similar character" to be joined against a single defendant, even though they do not arise out of the same or connected transactions. Charges against multiple defendants may not be joined merely because they are similar in character. *Cupo, supra,* at 993; *King, supra* at 703; *Williamson, supra; Wright, supra* at 325), and even dissimilar charges may be joined against multiple defendants if they arise out of the same series of transactions constituting an offense or offenses. *See, e.g., Scheve* v. *United States,* 184 F.2d 695 (D.C. Cir. 1950) (keeping a gaming table and aggravated assault). Except for this difference, the test for joinder under the two provisions is the same. 8 Moore's Federal Practice 8-23, 8-24.

Appellants concede that, on the Government's theory of the evidence, both the conspiracy count and the substantive counts under sections 1952 and 2314 grew out of a series of transactions relating to the "peeked" games at the Friars Club that were participated in by all defendants and therefore that these counts were properly joined, subject to defendants' right to relief under Rule 14 on a showing of undue prejudice. They contend, however, that the alleged failure of each of them to report his winnings from the illegal enterprise[12] was an individual act and not part of the series of acts in which all defendants participated.

It is implicit in the language of Rule 8(b) that so long as all defendants participate in a series of acts constituting an offense or offenses, the offenses and defendants may be joined even though not all defendants participated in every act constituting each joined

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[12]The indictment alleged that the unreported income came "from card playing activities at the Friars' Club." However, the evidence relied upon by the Government at trial related to unreported income of Teitelbaum and Rosalli from "peeked" games. Although Rule 8(b) standards are stated in terms of required allegations, a conviction will not be reversed on appeal if the evidence at trial establishes that joinder was proper; for even if the rule is read literally to require that the basis for joinder appear on the face of the pleading, the error would then be harmless. *Griffin* v. *United States,* 272 F.2d 801, 802-803 (5th Cir. 1959).

offense.[34] Rule 8(b)'s "goal of maximum trial convenience consistent with minimum prejudice"[35] is best served by permitting initial joinder of charges against multiple defendants whenever the common activity constitutes a substantial portion of the proof of the joined charges.

Under this standard, joinder was permissible here. Proof of the cheating at the Friars Club and the distribution of the proceeds was a substantial part of the proof of both the conspiracy charge and the substantive charges under sections 1952 and 2314. It was also a substantial part of the evidence supporting the tax charges, which required proof of the receipt of income as well as proof that such income was not reported. Indeed, the only Government evidence applicable solely to the tax counts was the tax return of each appellant for the year in question. Because of this large area of overlapping proof, trial economy and convenience were served by joinder, and because the area of proof that would be inadmissible at separate trials was relatively small, any additional prejudice to the defendants from the joinder was slight.

In *United States* v. *Granello*, 365 F.2d 990 (2d Cir. 1966), it was held impermissible to join charges against two defendants for failing to report income simply because they had earned the un-

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[34] The closing sentence of Rule 8(b) reads:

> "Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count." (Emphasis added.)

See Wright, Federal Practice and Procedure, Vol. 1, at 324; *Williamson* v. *United States*, 310 F.2d 192, 197 n. 16 (9th Cir. 1962); *Kivette* v. *United States*, 230 F.2d 749, 753 (5th Cir. 1956); *Scheve* v. *United States*, 184 F.2d 695, 696 (D.C. Cir. 1950).

[35] 8 Moore's Federal Practice at 8-36. In *Bruton* v. *United States*, 391 U.S. 123, 131 n. 6 (1968), the Court quoted with approval the following language from *Daley* v. *United States*, 231 F.2d 123, 125 (1st Cir. 1956):

> "The rules are designed to promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of defendants to a fair trial."

See also, King v. *United States*, 355 F.2d 700, 703 (1st Cir. 1966); *Cataneo* v. *United States*, 167 F.2d 820, 823 (4th Cir. 1948); 8 Moore's Federal Practice 8-3, 8-36; ABA Minimum Standards for Criminal Justice, Joinder and Severance, 15-16 (Approved Draft 1968). *Cf. Baker* v. *United States*, 401 F.2d 958, 971 (D.C. Cir. 1968) (Rule 8(a)).

reported income in joint business activity. The court based its conclusion on the language of Rule 8(b), which permits joinder only if defendants participated in the same acts or series of acts "constituting an offense or offenses." In *Granello*, the joint business activity was not in itself illegal. In the present case, however, the joint activity from which the unreported income was received constituted an offense or offenses in itself.[36]

Granello does not hold that the joined offenses, or any of them, must be based entirely upon the acts or series of acts in which all defendants participated, and it is clear that they need not. For example, in *Turner* v. *United States*, 222 F.2d 926 (4th Cir. 1955), joinder of separate charges of failing to report income against two individuals was permitted where the defendants earned the unreported income in a partnership business.[37] In *Daley* v. *United States*, 231 F.2d 123 (1st Cir. 1956), the court upheld joint trial of defendants individually charged with failure to register, and with failure to pay an occupational tax, before engaging in a gambling business, as required by 26 U.S.C. (I.R.C. 1939), §§ 3285, 3291. Each individual was required to register and to pay the occupational tax separately. Joinder was permitted because all of the defendants participated in the same gambling business that "constituted the concluding element of the two offenses" (126).[38] *Evans* v. *United States*, 349 F.2d 653 (5th Cir. 1965), is to the same effect. In *Scheve* v. *United States*, *supra*, 184 F.2d 695, all

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[36]Hence, it is not necessary to decide whether we agree with *Granello*. On the one hand, the goal of trial economy is served by joinder whenever the overlapping evidence arising out of joint activity is great, whether or not that joint activity is in and of itself illegal. On the other hand, confining joinder of defendants to cases in which the series of acts or transactions in which all participate is itself illegal limits the individual's exposure to joint trial to situations that he is more clearly on notice to avoid.

[37]*Granello* distinguishes *Turner* on the ground that in *Turner* the defendants had jointly falsified the partnership records and filed false partnership returns that were the basis of the individual returns.

[38]The court rested its decision upon considerations of trial economy:
"Considering the participation by the defendants in the same gambling business as 'the same act or transaction,' is it the same act or transaction 'constituting an offense or offenses,' within the meaning of Rule 8(b)? In a hypercritical reading of the rule, it may be suggested that proof of a particular defendant's participation in such act or transaction does not of itself establish the offense charged, for this particular defendant might

jointly tried defendants were charged with keeping a gaming table, and one defendant was charged with assaulting a disgruntled customer.

Baker v. *United States, supra*, 401 F.2d 958, is also relevant here, although it involved joinder of charges against a single defendant.[39] The court held that charges of larceny and interstate transportation of fraudulently obtained funds were properly joined with a charge of evading income tax for the year of the theft, because

> "In determining whether offenses are based on 'acts or transactions connected together,' the predominant consideration is whether joinder would serve the goals of trial economy and convenience; the primary purpose of this kind of joinder is to insure that a given transaction need only be proved once. In view of this rationale, and the fact that the tax evasion charge could not be proved without establishing the theft as well, the district court's conclusion that the offenses were 'connected together' was fully warranted." (401 F.2d at 971-972).

If we are wrong in our interpretation of Rule 8(b), and joinder of the tax counts with the others was improper under the rule, we would hold the error harmless. Although it is frequently said that a joinder not authorized by Rule 8 is prejudicial per se,[40] an examination of the cases indicates that prejudice is assumed without further inquiry only where two or more defendants have been tried

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or might not, have paid the occupational tax, or complied with the registration requirements. But Rules 13 and 8(b) are not to be read so narrowly. See *Catanco* v. *United States*, 4 Cir. 1948, 167 F.2d 820, *Jordan* v. *United States*, 5 Cir. 1941, 120 F.2d 65. The rules are designed to promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial. Rule 8(b) on its face contemplates the situation where some of the evidence might be admissible against one defendant and not against a co-defendant at a single trial, for in its concluding clause the rule provides that 'all of the defendants need not be charged in each count.'" (231 F.2d at 125).

[39] As noted earlier in the text, although Rule 8(a) allows joinder of offenses solely on the ground that they are of "same or similar character," while Rule 8(b) does not, the tests under the two are otherwise indistinguishable. 8 Moore, *supra*, 8-23 — 8-24. The "same or similar character" basis for joinder was not involved in *Baker*.

[40] Wright, *supra*, 325; Moore, *supra*, 8-4, 8-14, and cases cited note 41.

jointly on wholly unrelated charges. *Baker* v. *United States, supra,* 401 F.2d at 974.[41] We agree with the reasoning that led the Courts of Appeals for the District of Columbia and Second Circuits to conclude that Rule 52 is applicable to misjoinder. *Baker* v. *United States, supra* at 973; *United States* v. *Granello, supra,* 365 F.2d at 995. *See also Scheve* v. *United States, supra,* 184 F.2d 695, 696.

As noted earlier, with the sole exception of the tax returns, all evidence admitted at the joint trial in this case would have been admissible at a separate trial of the conspiracy and substantive charges under sections 2314 and 1952. In this context, the additional disclosure that some of the participants had failed to include a small part of the profits from the illicit scheme in their income tax returns would hardly seem calculated appreciably to prejudice the defendants. And, since the greater part of the proof relating to the rigged games would also have been admissible at a separate trial of the tax charge of each individual defendant, it is difficult to believe that their conviction on those charges was due in any part to the mere fact that the trial was joint. *Cf. Baker* v. *United States, supra,* 401 F.2d at 972-973; *United States* v. *Granello, supra,* 365 F.2d at 995.

We also reject appellants' contention that even if joinder were permissible under Rule 8, the trial court should have granted their Rule 14 motions for severance and separate trials.[42] As appellants recognize, such a motion calls for an exercise of the trial court's discretion, and the court's ruling is subject to reversal only when that discretion is abused. *United States* v. *De La Cruz Bellinger,* 422 F.2d 723 (9th Cir. 1970); *Tillman* v. *United States,* 406 F.2d 930 (5th Cir. 1969); *Parker* v. *United States,* 404 F.2d 1193, 1194 (9th Cir. 1968); *Brown* v. *United States,* 375 F.2d 310 (D.C. Cir.

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[41] *See, e.g., Metheany* v. *United States,* 365 F.2d 90, 94 (9th Cir. 1966); *United States* v. *Granello, supra; Cupo v. United States, supra; King* v. *United States, supra; Ward v. United States,* 289 F.2d 877, 878 (D.C. Cir. 1961); *Ingram* v. *United States,* 272 F.2d 567, 569, 570 (4th Cir. 1959); *see McElroy* v. *United States,* 164 U.S. 76, 80-81 (1896).

[42] Federal Rules of Criminal Procedure 14 states:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. . . ."

1966); *Fernandez* v. *United States*, 329 F.2d 899, 906 (9th Cir. 1964). We find no abuse of discretion here.

Appellants' basic contention is that the issues were so complex, the trial so lengthy, and the evidence admissible against only one or some of the four so voluminous and prejudicial, that the jury could not make a fair assessment of each individual defendant's guilt. But the story was simple—a half-dozen men, using various interstate facilities, cheated at cards at the Friars Club intermittently over a period of years. The factual issues were not complex—though the charges were fairly numerous, they were based upon only a few incidents. The extreme length of the trial was in large part because of the elaborate and exhaustive defense. The court carefully instructed the jury about the compartmentalization of the evidence as to each defendant. With only four defendants and relatively few critical factual incidents to consider, an exhaustive presentation by both sides over an extended period, and careful guidance by the court, we think the jury was competent to accord each appellant fair and impartial consideration.

Roselli, citing *de Luna* v. *United States*, 308 F.2d 140 (5th Cir. 1962), argues that severance was required because Friedman and Teitelbaum elected to testify while he did not. In that case, however, the defenses of the accused were antagonistic. The testifying defendant sought to establish that de Luna, and not he, had committed the crime, and his counsel commented unfavorably upon de Luna's failure to take the stand. The defenses of Friedman and Teitelbaum were not antagonistic to that of Roselli: indeed, Friedman's testimony tended to exculpate Roselli; and there was no comment from any quarter on Roselli's failure to testify.

V

Appellants argue that they were prejudiced by a variety of errors in the examination of witnesses and admission of evidence.

A. They complain that the jury was made aware that two witnesses subpoenaed by the Government (Gebhard and Snyder), and a defense witness under Government cross-examination (Lewin), declined to answer questions on the ground that their testimony might incriminate them. Appellants rely upon the two lines of reasoning outlined in *Namet* v. *United States*, 373 U.S. 179, 186 (1936):

> "First, some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Govern-

> ment makes a *conscious* and *flagrant* attempt to build its case out of inferences arising from use of the testimonial privilege. . . . A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inference from a witness' refusal to answer added *critical weight* to the prosecutor's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." (Emphasis added.)

The incident involving Lewin merits only brief consideration. Both lines of reasoning discussed in *Namet* rest on the premise that the inference that the jury may draw from the witness' refusal to testify is of substantial importance to the Government's case. Lewin's testimony related only to a collateral issue of minor significance. The questions he refused to answer on cross-examination were directed to matters of impeachment, not issues in the case, and did not involve the defendants in any way. Even if the jury inferred that Lewin's answers would have incriminated him, the inference could have had only the most remote and indirect relevance to defendants' guilt.

Turning to Gebhard and Snyder, we first reject any suggestion of prosecutorial misconduct. Although the Government was advised that both men would refuse to answer, the record negates any conscious effort by the Government "to build its case out of inference arising from use of the testimonial privilege."

Snyder was questioned before the jury because the court and counsel for both sides believed that he could not be punished for contempt unless he refused to answer in the regular course of the trial. He was asked and refused to answer but one question. The Government made no effort to exploit the incident.

Gebhard was never questioned before the jury. However, because he had been mentioned frequently in the testimony and had appeared in court for identification by other witnesses, the Government expressed concern that unless the jury was advised of the reason for his failure to testify it might infer that his testimony would have been adverse to the Government's case. Acting on the authority of *United States* v. *Romero*, 249 F.2d 371, 375 (2d Cir. 1957) *(see also United States* v. *Gernie*, 252 F.2d 664, 669 (2d Cir.

1958)), the court instructed the jury as indicated in the margin.[43] Thus, the prosecution's motivation was wholly defensive; there is nothing to support a charge that the Government sought to draw from Gebhard's silence an inference favorable to its case.[44]

Since we conclude that there was no prosecutorial misconduct, the question is whether, in the particular circumstances of this case, the inference that the jury may have drawn when Gebhard and Snyder refused to testify "added critical weight to the prosecutor's case in a form not subject to cross-examination." We think not.

There is no doubt that the matters to which Gebhard would have testified were vital, for it was the Government's theory that Gebhard acted as "peekman" after Resch's imprisonment, perhaps assisted on one occasion by Snyder. Nonetheless, we think it unlikely that the jury drew an inference from their silence that added "critical weight" to the Government's case. As we have noted, Gebhard was asked no questions in the presence of the jury. Snyder was asked a damaging question, but only one, and his potential as a witness appeared relatively limited. The Government had abundant evidence, albeit circumstantial, establishing the elements of the offense to which Gebhard's testimony might have related. The incidents were not calculated to impress the jury; the questioning of Snyder and the court's instruction regarding Gebhard occupy two or three pages in a transcript of over sixteen thousand pages—a

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[43] "THE COURT: Ladies and gentlemen of the jury, during the course of the case you have seen from time to time a man referred to as Pete Gebhard.

"Mr. Gebhard was called as a witness. He refused to testify, and has, insofar as this case is concerned, retired from the courtroom.

"You are not to consider this fact in any connection whatsoever in your determination of the issues that will be presented before you. You are not to speculate as to what his testimony might have been had he testified one way or the other.

"I only mention this in order that you might not otherwise wonder why Mr. Gebhard, whom you have seen, has not testified. This was by his own determination, and it had nothing to do with the Government or any of the defendants. This was his own doing. So you will be governed accordingly."

[44] In context, the remark in closing argument to which appellants point is simply a reference to the fact that evidence concerning the later period of the conspiracy was largely circumstantial.

few moments in a six-month trial. The jury was admonished, immediately and forcefully, that each witness' refusal was of his own doing, and that no inference was to be drawn from it, one way or the other."[9]

We wish to add, however, that we do not approve the practice of questioning a witness before the jury after he has indicated that he will decline to testify, as Snyder had, nor of advising the jury that a witness has refused to testify, as was done with Gebhard, when the defense had not sought to use the witness' silence to the Government's disadvantage. As Judge Hand said in *United States* v. *Maloney*, 262 F.2d 535, 537 (2d Cir. 1959), when a potential Government witness indicates that he will refuse to testify, the situation is one in which either advising the jury of this fact or not doing so "results in prejudice to one side or the other; and it is impossible, so far as we can see, to lay down any general rule that will cover all instances." Judge Hand concluded, however, and we agree, that unless and until the defense seeks to exploit the situation to its advantage, the balance must be struck in favor of the accused. On the other hand, "if the accused at any stage of the trial should argue that the failure to call such a witness indicated that he would not support the charge, the prosecution should be free to disclose the fact that it had reason to suppose that the witness would refuse." *Id.*

B. Appellants suggest that the Government exceeded the admittedly broad scope of proper cross-examination in attempting to impeach the witnesses Lewin and Carson. If the Government pressed too hard, the error does not justify reversal. The purpose of Lewin's testimony, as we have just noted, was to impeach the Government witness Seach by contradicting Seach's testimony as to a fact col-

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[9] The cases relied upon by appellants are distinguishable. In *Fletcher* v. *United States*, 332 F.2d 724 (D.C. Cir. 1964), the prosecution was allowed to ask an alleged accomplice of the defendant seven leading questions that effectively described the crime. There were few witnesses and the trial was short (less than three days). The testimony sought would have corroborated that of the Government's only other witness. The trial judge's admonitory instruction was weak and confusing.

In *Robbins* v. *Small*, 371 F.2d 703 (1st Cir. 1967), the prosecution was allowed to ask the witness fourteen leading questions, including many extremely prejudicial to the defendant's case. In *Sanders* v. *United States*, 373 F.2d 735 (9th Cir. 1967), the witness was asked at least ten incriminating questions. In *United States* v. *Maloney*, 262 F.2d 535 (2d Cir. 1959), the trial court failed to give the admonitory instruction.

lateral to the offenses charged. Carson was also called to impeach Seach by offering a lay opinion about Seach's mental health. Assuming that these witnesses were unfairly impeached so that their credibility was to some extent improperly diminished, reducing somewhat the tendency of their testimony to impeach Seach, in the context of this record the ultimate impact of the error upon the jury's determinations was surely de minimis."[46]

C. Appellants complain of the admission of testimony about their participation in other "peek" operations. Much of this evidence came in as proper redirect examination of Seach after appellants had opened the issue in cross-examination. Moreover, the evidence was relevant to the issues of intent, knowledge, and the existence of a continuing "business enterprise" (*Cohen v. United States*, 378 F.2d 751, 758-759 (9th Cir. 1967); *Hernandez v. United States*, 370 F.2d 171, 172 (9th Cir. 1966)),[47] and we cannot say that the trial judge erred in the exercise of the wide discretion vested in him to determine whether its probative value exceeded its prejudicial effect. *United States v. Feldman*, 136 F.2d 394, 399 (2d Cir. 1943).[48]

D. Appellant Roselli moved before trial to suppress evidence obtained through Government-conducted electronic surveillance. On the Government's assurance that no fruits of the surveillance would be used at trial, the trial court elected to hold the suppression hearing after trial. Roselli claims it was error to refuse a pre-

[46]We also reject under Rule 52(a) Teitelbaum's argument that it was error to require him to produce tape recordings of telephone conversations between himself and Government witness Mathes. Teitelbaum generally asserts that the tapes contain prejudicial material, pointing to nothing in particular. We have read a transcript of the tapes. They are liberally laced with protestations of innocence and exculpatory remarks by Teitelbaum, and include nothing we would regard as prejudicial to him.

[47]Testimony concerning the so-called "Beverly Hills Hotel Incident" was also relevant to the question of when Teitelbaum first met Seach, which became important in connection with Teitelbaum's efforts to impeach Seach.

[48]Contrary to Teitelbaum's contention, we are satisfied that the jury understood from the trial judge's admonition that evidence regarding these "peek" operations was to be considered only against those defendants who were said to have participated in a particular operation.

We also reject Jacobs' argument regarding the testimony of cheating at the "Old" Friars Club. It was stricken as too remote and the jury was admonished to disregard it; and neither the content nor context suggests any reason for doubting the efficacy of these remedial steps.

trial hearing, that the hearing conducted was inadequate, and that the Government failed to establish that the evidence admitted at trial was free of taint. Essentially the same issues were decided against Roselli in *United States* v. *Filippo Sacco a/k/a John Roselli*, F.2d (9th Cir. June 17, 1970) (No. 24,247), and no argument raised on the present appeal has shaken our confidence in that decision.

E. We find no reversible error, if error at all, in the admission of the various documents to which Jacobs objected on the grounds that they were not properly authenticated, that a proper foundation was not laid, or that they were irrelevant or immaterial.

VI

We cannot agree with appellants that the Government's closing argument exceeded the bounds of proper advocacy to a significant degree, or contained language that might have been interpreted as a comment on the failure of Jacobs and Roselli to testify.

VII

Nor are appellants' objections to the instructions well taken.

The elements of the section 1952 offense were fully and correctly described; appellants' arguments to the contrary rest largely upon an interpretation of the statute that we have rejected. Their objections to the *Pinkerton* instruction also raise issues dealt with earlier in this opinion.

With one exception, the objections Friedman now makes to the section 2314 instructions were not raised below, and the one objection made to the trial judge led to a prompt and, in our view, entirely adequate corrective instruction. Reading the instructions as a whole, Friedman's argument that they deprived him of the benefit of the rule that guilt must be shown beyond a reasonable doubt approaches the frivolous.

Teitelbaum's objection to instructions to the effect that, once established, a defendant's membership in a conspiracy having continuity is presumed to continue until he demonstrates to the contrary, is without substance. *Hyde* v. *United States*, 225 U.S. 347, 369 (1912); *United States* v. *Goldberg*, 401 F.2d 644, 648 (2d Cir. 1968); *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964).

Friedman's conviction on Count 19 is reversed. The judgments are otherwise affirmed.

ARCATA GRAPHICS, SAN FRANCISCO 10-1-70—560

APPENDIX "B"

Order.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. John Roselli, Defendant-Appellant. No. 24,220.

United States of America, Plaintiff-Appellee, v. Benjamin Teitelbaum, Defendant-Appellant. No. 24,290.

United States of America, Plaintiff-Appellee, v. Manuel Jacobs, Defendant-Appellant. No. 24,300.

Before: BROWNING, DUNIWAY, and HUFSTEDLER, Circuit Judges.

The panel as constituted in the above cases has voted to deny the petitions for rehearing and to reject the suggestions for rehearing in banc.

The full court has been advised of the suggestions for in banc rehearing, and no judge of the court has requested a vote on the suggestions for rehearing in banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing in banc are rejected.

Dated: October 30, 1970

APPENDIX "C"

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Milita, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 371 of Title 18, United States Code:

Conspiracy to commit offense or to defraud United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one of more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 1952 of Title 18, United States Code:

Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigation of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Section 2314 of Title 18, United States Code:

Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

As amended May 24, 1949, c. 139, §45, 63 Stat. 96; July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87-371, §2, 75 Stat. 802; Sept. 28, 1968, Pub. L. 90-535, 82 Stat. 885.

(*1968 Amendment.* Pub. L. 90-535 prohibited transportation with unlawful or fraudulent intent in interstate or foreign commerce or traveler's checks bearing forged countersignatures.)

Penal Code, State of California.

§332. [Obtaining money or property by fraudulent game or trick.] Every person who by the game of "three-card monte," so-called, or any other game, device, sleight-of-hand, pretensions to fortune-telling, trick, or other means whatever, by use of cards or other implements or instruments, or while betting on sides or hands of any such play or game, fraudulently obtains from another person money or property of any description, shall be punished as in case of larceny of property of like value.